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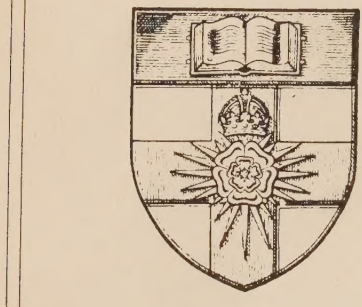

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THE IRISH REPORTS,

PUBLISHED UNDER

THE CONTROL OF THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND:

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT OF BANKRUPTCY,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

WILLIAM GREEN,

BARRISTER-AT-LAW.

1895.

VOL. I.

CHANCERY AND PROBATE DIVISIONS, AND COURT OF BANKRUPTCY.

DUBLIN:

PUBLISHED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND,

BY EDWARD PONSONBY,

116, GRAFTON-STREET, DUBLIN.

1895.

BIBL. LONDIN.

DUBLIN:

PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND,

At the University Press,

BY PONSONBY AND WELDRICK.

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CORRIGENDA.

Page 255, line 12 from foot, *for* "*Chaffen*" *read* "*Chaffers.*"
,, 303, footnote (2), *for* "Ch. Div. 479" *read* "L. J. Ch. 379."
,, 306, footnote (1), *for* "Ch. Div. 479" *read* "L. J. Ch. 379."
,, 371, line 15 from foot, *for* "Altenborough's" *read* "Attenborough's."

NOTE.

The Court of Appeal have affirmed the decision in PORTER *v.* WALSH [1895] 1 I. R. 284.

In the Trinity Sittings, 1895, the Right Hon. Samuel Walker resigned the Great Seal; and the Right Hon. The Mac Dermot and Charles Hare Hemphill, Esq., Q.C., resigned their respective offices of Attorney-General and Solicitor-General. Thereupon Lord Ashbourne was appointed Lord Chancellor, the Right Hon. John Atkinson was appointed Attorney-General, and William Kenny, Esq., Q.C., was appointed Solicitor-General.

In the same sittings, the Right Hon. Samuel Walker was appointed a Lord Justice of Appeal.

CASES

DETERMINED BY

THE CHANCERY AND PROBATE DIVISIONS

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE COURT OF BANKRUPTCY IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1895.

INDEPENDENT PROTESTANT LOAN FUND SOCIETY; Ex parte MORTON.

FRIENDLY PROTESTANT PARTNERSHIP LOAN FUND COMPANY; Ex parte HALL.

V.-C.
1894.

June 11.
July 9.

Winding-up Companies Act, 1862—*Unregistered Company—Friendly Societies Acts*, 18 & 19 *Vict. c.* 63; 38 & 39 *Vict. c.* 60—*Industrial and Provident Societies Acts*, 15 & 16 *Vict. c.* 31; 56 & 57 *Vict. c.* 39.

The Court has jurisdiction, under section 199 of the Companies Act, 1862, to wind up compulsorily, as an unregistered Company, a Society registered under the Friendly Societies Acts, but not registered under the Companies Act, 1862.

Members of a Friendly Society, who have given notice of withdrawal of deposits are not in the same position as outside creditors, and are not entitled *ex debito justitiæ* to obtain an order for winding-up; but where the circumstances, in the opinion of the Court, make it just and equitable so to do, the Court will order such a Society to be wound up.

IN each of these cases an application for winding-up was made by a member of the Society, who had served notice of withdrawal of deposit, and the applications were supported by the respective

V.-C. 1894.

INDEPEND'NT PROTESTANT LOAN FUND SOCIETY; *Ex parte* MORTON. FRIENDLY PROTESTANT PARTN'RSHIP LOAN FUND CO.; *Ex parte* HALL.

Societies. The petitioners did not seek to obtain any priority over members who had not given notice of withdrawal. The funds of the Societies were not sufficient to pay the members in full, but neither Society was indebted to outside creditors. The Independent Protestant Loan Fund Society was registered under the Friendly Societies Act, 18 & 19 Vict. c. 63, and on the 19th March, 1894, passed a resolution to wind up voluntarily. The Friendly Protestant Partnership Loan Fund Company was registered under the Industrial and Provident Societies Act, 1852, 15 & 16 Vict. c. 31. Neither Society was registered under the Companies Act, 1862.

S. L. Brown, for the petitioner in each case, relied on an affidavit of Joseph Tumulty, the liquidator appointed by the Independent Society.

Gordon, Q.C., and *Philip White*, for Mr. Gerald Byrne, to whom certain costs were due, and who was the only outside creditor, and for members of the Societies who had served notice of withdrawal of deposits, opposed the applications, and contended that the Court had no jurisdiction to make the orders sought, and that the proper mode to adopt was an application to the Registrar of Joint Stock Companies under 38 & 39 Vict. c. 60, s. 25. [Counsel referred to *Re Sunderland Building Societies* (1).] Even if the Court had jurisdiction it ought not to be exercised, as the 38 & 39 Vict. c. 60, provided a cheaper and more expeditious mode of dealing with the affairs of these Societies.

July 9.

THE VICE-CHANCELLOR, in *The Independent Protestant Loan Fund Society, Ex parte Morton*, gave judgment as follows:—

This Society was constituted and registered under the Friendly Societies Act in the year 1855, under the 18 & 19 Vict. c. 63. This Act was repealed by that of 38 & 39 Vict. c. 60, and it is by the latter Act that the Society is now regulated. It is not a registered Company under the Act of 1862, and can only be wound up under the 199th section of that Act as an unregistered Company. Under that section this Court has no power of winding-up voluntarily, or under supervision, and the petition prays generally for a winding-up by the Court.

(1) 62 L. T. (N. S.) 293.

The petitioner claims to be a creditor of the Company for a sum of £70, which was deposited by him with the Company, and for the withdrawal of which he duly gave notice. The 20th rule provides that any member may withdraw from the Society at any time by giving one month's notice in writing to the Committee, and he shall thereupon be paid all sums then to his credit in the funds of the Society, after making the deductions expressed in the 5th rule. The 5th rule provides that the rate of subscription shall be 2*s.* 6*d.* at least per share, and that the sum or sums to any member's credit in the funds of the Society shall consist of his weekly payments, and his share of the profits, and accumulations in respect of such profits, deducting so much of any loan to such member as shall be then outstanding and unpaid. It follows that on such withdrawal the member ceases to belong to the Society, and the Society becomes a debtor to him for the amount due to him upon a settlement of the account provided for by rule 5. This, however, is subject to a qualification that the withdrawal is not made when the Society is in an actual state of insolvency. It was contended here that this Society was in such a state when the plaintiff gave notice of withdrawal, but a controversy exists as to this as a matter of fact, and also as to this fact being known to, or within the knowledge of, the petitioner. There is no outside debt due by the Society, except on foot of a claim for a small sum of costs due to a Mr. Byrne, who opposes the making of an order for winding-up. There are liabilities to a considerable amount to members who have funds to their credit in the Society for their subscriptions, but these cannot be regarded as debts in the ordinary sense, at least in the cases where no notices of withdrawal have been given.

The position of members who have given notice of withdrawal under a Society's rules has been considered in several cases, and the principle has been established that they are not in the same position as outside creditors, and have therefore no right *ex debito justitiæ* to obtain an order for winding-up. In *Re Sunderland Building Societies* (1) it was held by the Queen's Bench Division that the right of withdrawal under rules similar to those of the Society

(1) 62 L. T. (N. S.) 293.

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INDEPEND'NT PROTESTANT LOAN FUND SOCIETY; *Ex parte* MORTON.

before me ceases to operate when the Society is in an actual state of insolvency, though no formal dissolution by winding-up order or otherwise has taken place; and that it is not the order to wind-up, but the state of things which to the knowledge of all concerned renders liquidation inevitable, that in such a case puts an end to the right to withdraw. That case was decided on a question raised in the course of proceedings in winding-up, and after an order was made; and it had reference to the priorities claimed by members who had given notice of withdrawal. Here the petitioner has at the bar by his counsel disclaimed any right to priority over the other members by reason of his notice of withdrawal. I cannot hold that he is a creditor in the ordinary sense; and it has been conclusively established by several cases that he still remains what has been termed "a creditor member," and that he continues bound by the rules of the Society. This proposition must include not only the actual rules made by the Society but any rules imposed on it by statute. In the case of the *Planet Building Society* (1) Lord Romilly, M.R., refused to grant a winding-up order under the Act of 1862, section 199, on this ground, but he indicated his opinion that under special circumstances such an order might be made on the application of a person in the position of a withdrawing member. Under that section the Court may make the order whenever the Court is of opinion that it is just and equitable that such an order should be made. There are strong special circumstances here in favour of such an order. The application is supported by the Society, and has been in fact brought forward by the petitioner at the instance of the Society. The Society owes nothing to outside creditors save the trifling sum I have mentioned. The funds of the Society are not sufficient for payment in full of all the sums due to its members. The plaintiff has disclaimed by his counsel at the bar all right to priority over the other members, and expressed his wish that the funds realized shall be divided rateably amongst all the members. At two special meetings of the Society duly convened resolutions were unanimously passed, first, that the Society should be wound-up voluntarily, and, secondly, that it should be

(1) L. R. 14 Eq. 441.

so wound-up under the supervision of the Court. A liquidator was appointed by them who has been engaged in the getting in of the assets. The objection to winding-up voluntary under supervision arising on the provisions of the 199th section do not appear to have occurred to the Society till after the petition was presented, but the prayer is large enough to include a compulsory order; that was the order moved for, and which was supported by the Society. Under these circumstances it appears to me just and equitable to make the only order I can make to carry out the wishes of the Society, namely, an order for compulsory winding-up.

It was contended that this case was one which ought to be disposed of by an application to the Registrar of Joint Stock Companies. There is nothing in the rules of the Society requiring this course to be taken. It is not a dispute between the Society and one of its members, as was the case in *Re Sunderland Building Societies* (1). The 22nd section of the Act of 1875 merely provides that every dispute between a member, &c., and the Society shall be decided in manner directed by the rules of the Society. The only rule in the subject is the 26th, which merely provides that all disputes in the Society shall be referred to arbitration by certain arbitrators appointed as therein provided. Here there is no dispute between the petitioner and the Society, and as this cannot in any view be deemed a dispute in the Society, I shall therefore make an order for the winding-up of the Society by the Court, and shall continue the liquidator appointed by the Society, with the usual consequential directions. I shall give the petitioner and the Society their costs in the matter.

In *The Friendly Protestant Partnership Loan Fund Company*; *Ex parte Hall*, THE VICE CHANCELLOR, said:—

This is an application for the voluntary winding-up, under the supervision of the Court of the Protestant Loan Fund Society, registered under the Industrial and Provident Societies Act, 1852. The facts are similar in all material respects to those of the case I have just disposed of. There is some difference in the law, as this Society is regulated by the Industrial and Provident Societies Acts,

(1) 62 L. T. (N. S.) 293.

V.-C. 1894.

FRIENDLY PROTESTANT PARTN'RSHIP LOAN FUND CO.; *Ex parte* HALL.

whereas the former Society is regulated by the Friendly Societies Acts. The Industrial and Provident Societies Act of 1852 was repealed by the Act of 1862, which was repealed by the Act of 1876, and again this was repealed by the Act of 1893, but all through the registration of existing Societies was preserved. The 58th section of the Act of 1893 provides that a registered society, which is by the 79th section interpreted to mean a society registered or deemed to be registered under that Act, may be dissolved by an order to wind-up the Company, or a resolution for the winding-up thereof made, as is directed in regard to Companies by the Companies Acts 1862 to 1890, the provisions of which shall apply to any such order or resolution, except that the term "Registrar" shall, for the purpose of such winding-up, have the meaning given to it by the Act of 1893; or by the consent of three-fourths of the members testified by their signatures to an instrument of dissolution. This is a re-enactment of section 17 of the Act of 1876, with the omission of the exception that the Court, having jurisdiction in the winding-up, should be the County Court. This incorporation of the Companies Acts brings the provisions of these Acts for winding-up registered Companies into operation as to Societies registered under the Industrial and Provident Societies Acts. Laying aside in this case also the claim of the petitioner as a creditor of the Society, I am of opinion that an order for winding-up may be made under the 199th section of the Companies Act, 1862. I shall therefore make an order for winding-up, under the supervision of the Court. The petitioner and the Company should have their costs in the matter.

Solicitor for the petitioners: *W. K. Johnston.*

Solicitor for the creditor and members opposing the application: *Gerald Byrne.*

T. H. M.

O'HEA *v.* SLATTERY (1).

Appeal.
1894.
April 24.
May 18.

Settlement—Personalty—Limitation to the use of the husband and intended wife, and the husband's children by former marriage and children of intended marriage—Joint tenancy—Springing use—Bankruptcy of husband.

A settlor assigned to trustees tenancies from year to year and personal chattels, to hold upon trust for the settlor until his then intended marriage, and after the solemnization thereof to the use of the settlor, his intended wife, and the children of the settlor by a previous marriage and any issue to be born of the intended marriage :—

Held (affirming the decision of the Vice-Chancellor), that the husband and wife, with the children of the first and second marriages, took as joint tenants, the class of unborn children to be opened when and as necessary, so as to include new members.

APPEAL from an order of the Right Hon. the Vice-Chancellor of Ireland, dated October 31st, 1893, in so far as it declared that Thomas Slattery and Johanna Slattery, otherwise Boland, his wife, and the children of the said Thomas Slattery, by his former marriage, and any children of his second marriage as the same should be born, were entitled to the property comprised in the settlement of February 11th, 1893, in joint tenancy.

By an indenture dated February 11th, 1893, and made between Thomas Slattery of the first part, Johanna Boland (widow) of the second part, and Richard Coghlan and Patrick O'Hea of the third part, reciting that Thomas Slattery was possessed of two several holdings held under statutory tenancies from year to year, and also of the chattels specified in the schedule to the said indenture, and reciting that a marriage was intended to be solemnized between the said Thomas Slattery and Johanna Boland, and that upon the treaty therefor it was agreed that the interest of the said Thomas Slattery in the said yearly tenancies, and the said chattels, should be settled upon the trusts thereinafter declared, in pursuance of the said agreement the said Thomas Slattery, as beneficial owner (with the approval of the said Johanna Boland), assigned

(1) Before WALKER, C., PORTER, M.R., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1894.

O'Hea v Slattery.

unto the said Richard Coghlan and Patrick O'Hea the said lands held as aforesaid, and the chattels specified in the schedule, to hold upon trust for the said Thomas Slattery until the said intended marriage, and after the solemnization thereof to the use of the said Thomas Slattery and Johanna Boland, and the children of the said Thomas Slattery, and any issue that might be born of the said intended marriage. And it was thereby agreed that the power of appointing a new trustee or trustees of the said indenture should be exerciseable by the said Thomas Slattery and Johanna Boland during their joint lives. And the trustees and trustee for the time being might from time to time for the advancement of any child or children of the said Thomas Slattery, or for any purpose essential to the improvement and better and more efficient working of said lands raise such sum or sums of money as in their judgment the necessities of the case should require, such sum or sums not to exceed in the aggregate £500, for the entire or part of which they might in their discretion require the bond of the said Thomas Slattery.

The children of Thomas Slattery mentioned in the said indenture were his children by a former marriage. Shortly after his marriage with Johanna Boland, and before the birth of any issue of the said marriage, Thomas Slattery became bankrupt.

The trustees of the said settlement issued an originating summons before the Vice-Chancellor, asking the Court to determine the following questions arising in the administration of the trusts of the said settlement, to wit:—"1. Have the trustees, on the true construction of the said deed, a discretionary power to determine in what proportion or to what extent Thomas Slattery and Johanna Boland are entitled to participate in the income or capital of the property put in settlement? 2. If the trustees have no discretion as expressed, what is the extent of the interest that Thomas Slattery takes in the said property? What is the extent of the interest of Johanna Boland, and of the children of the said marriage?" By his order of October 31, 1893, now appealed from, the Vice-Chancellor answered the first of these questions in the negative, and declared in answer to the second question that Thomas Slattery and Johanna Slattery, otherwise Boland, his wife, and the children of the said Thomas Slattery by his former marriage, and any children

of his second marriage as same shall be born, were entitled to the said property comprised in the said indenture in joint tenancy.

Appeal. 1894. O'HEA v. SLATTERY.

Roche, Q.C., and *J. H. Moore*, for the appellants, the assignees in bankruptcy of Thomas Slattery:—

Under the terms of the settlement the husband, wife, and children of the former marriage only are entitled as joint tenants to this property: the grant to the children of the second marriage not being *in esse* was inoperative. "*B* having divers sonnes and daughters, *A* giveth lands to *B et liberis suis, et a lour heires*, the father and all his children do take a fee-simple joyntly by force of these words (their heires); but if he had no childe at the time of the feoffment, the childe borne afterwards shall not take." Coke upon Littleton, Bk. I., cap. i., sect. i., § 9*a*: Shep. Touchstone ii. 235; *Crone* v. *O'Dell* (1); *Elizab. Stephens' Case* (2).

The same principle applies to personal estate: *Holden* v. *Smallbrook* (3); *Warren* v. *Johnson* (4). In the result, therefore, the husband, wife, and children of the first marriage take as joint tenants: *Humphrey* v. *Taylor* (5). [They also cited Fearne, Contingent Remainders, p. 457, and Elphinstone, Norton, and Clarke on Deeds, p. 357.]

George Wright, Q.C., and *Daniel Mahony*, for Mrs. Slattery.

Ignatius O'Brien, for the trustees of the settlement.

WALKER, C.:—

May 18.

The question in this case arises upon the construction of a marriage settlement, dated 11th February, 1893, executed by Thomas Slattery, a widower, with children, on the occasion of his marriage with Johanna Boland. By the settlement Thomas Slattery assigned to trustees, Richard Coghlan and Patrick O'Hea, two farms held under tenancies from year to year, and certain personal chattels, "to hold upon trust for the said Thomas Slattery, until the said intended marriage, and after the solemnization

(1) 1 Ball & Beatty, at p. 458, *per* Downes, C.J.
(2) Owen, 152.
(3) Vaughan, 199.
(4) 2 Rep. in Ch. 69.
(5) 1 Ambler, 138.

Appeal. 1894. O'Hea v. Slattery. Walker, C.

thereof to the use of the said Thomas Slattery, and Johanna Boland, and the children of the said Thomas Slattery, and any issue that may be born of the said intended marriage. . . . . And the trustees, or trustee for the time being may from time to time, for the advancement of any child, or children, of the said Thomas Slattery, or for any purpose essential to the improvement and better and more efficient working of the said lands raise such sum or sums of money as in their judgment the necessities of the case may require, such sum or sums raised as aforesaid not to exceed in the aggregate £500."

Patrick O'Hea took out a summons under Order LV., Rule 4, asking the Court to determine the following questions arising in the administration of the trusts of the settlement:—"1. Have the trustees, on the true construction of the said deed, a discretionary power to determine in what proportion or to what extent Thomas Slattery and Johanna Boland are entitled to participate in the income or capital of the property put in settlement? 2. If the trustees have no discretion as expressed, what is the extent of the interest that Thomas Slattery takes in the said property? What is the extent of the interest of Johanna Boland, and of the children of the said marriage?" By his order, dated the 31st October, 1893, the learned Vice-Chancellor answered these questions in the following manner:—"The Judge doth declare in answer to the first question contained in the said summons that on the true construction of the said settlement the said trustees have not a discretionary power to determine in what proportion or to what extent Thomas Slattery and Johanna Boland are entitled to participate in the income or capital of the property put in settlement; and the Judge doth further declare, in answer to the second question contained in the said summons, that Thomas Slattery and Johanna Slattery, otherwise Boland, his wife, and the children of the said Thomas Slattery by his former marriage, and any children of his second marriage, as same shall be born, are entitled to the property comprised in the said settlement of the 11th day of February, 1893, in joint tenancy." The notice of appeal asks a declaration that Thomas Slattery and Johanna Slattery and the children of Thomas Slattery by his former marriage are entitled to the property comprised in the settlement in joint tenancy, that is, of

course, so entitled to the exclusion of the children of the second marriage.

It would seem strange that the children for whom the settlement would naturally be expected to provide should be excluded from all benefit.

In this case, of course, the whole estate in the yearly tenancy and chattels in the trustees, and any interest in the *cestuis que trustent* was a mere trust. I think that the first observation is that in all such cases the intent must prevail, and that the rule applicable to devises and uses applies. In *Kenworthy* v. *Ward* (1) a testatrix had given to an unmarried lady and her children, if she married, the residue of her property in these terms:—"I give her the interest of the residue of my property for her life; and should she marry and have a child or children, I give it or them the principal for ever." The lady after the death of the testatrix married the plaintiff and had four children, one of whom predeceased her. The question then arose between the plaintiff, as administrator of his deceased child and the executors of the testatrix as to whether the children took the principal as joint tenants or tenants in common under the terms of the will. The case came before Vice-Chancellor Sir William Page-Wood, who says (at p. 203):—"It was indeed admitted, in the argument of this case, that it comes to this point—whether, in deciding the question, I am to follow the law as to uses and devises, or to follow the course of decisions on conveyances at Common Law. I think there can be no question that, with reference to trusts, I ought to follow what is said to be the reason of the rule on uses and devises, namely, the intent of the parties." The learned Judge then refers to the argument that equity is inclined to favour tenancies in common and not joint tenancies; and he observes that "the Court has so far done this as to say, that where it finds slight words of intention of severance, the course is to act upon them; but where the words are such as to create a joint tenancy, that must be taken to be the real intent of the conveyance, unless there is some distinct ground to prevent its operation; and it does not appear to me, after those decisions on uses and devises, that I could possibly

(1) 11 Hare, 196.

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say that the intent must not, with regard to trusts of personal estate, be taken to resemble the case of uses and devises." The Vice-Chancellor then refers to *Mence* v. *Bagster* (1), and concludes: "It seems to me that the analogy between the trust and the use is perfect, and that the trust is held in one mass for the benefit of all children as they come into *esse;* the whole class taking the whole in joint tenancy, till another individual comes into the class."

I do not think that the instrument in the case before us is to be considered as a Common Law grant. "At Common Law," says Sir William Page-Wood in *Kenworthy* v. *Ward* (2), "when the interest has once vested in remainder, it must vest either wholly in one or be taken in moieties: they must take the entirety one way or other; and there is no mode, as there is in a use, of getting the entirety into one, and then taking it out of him afterwards by the springing use, as soon as the *cestui que use* comes into *esse*. Therefore at Common Law there is no remedy; you must once for all see what estate A, the party in remainder, is to take: that estate he takes, and will hold for the rest of his existence, there being no uses declared by means of which any portion may be taken out of him; and, therefore you have, once for all, to ascertain whether he will take the whole or a moiety, the intent being that he should take the moiety, and not the whole. If he took the whole it would be against the intent." Again, it is said in Watkins on Conveyancing, p. 304:—"By limiting an estate to trustees to the use of others, many limitations may be made by virtue of the Statute which would be inoperative at Common Law previous to the Statute. At Common Law, a grantee, to take an immediate estate, must be named in the granting part, otherwise he could not take by a limitation in the *habendum*, so that it could not be limited to a person unborn to take the first estate; but now, under limitations to uses, such person may take the first estate, the use to support it in the meantime resulting to the grantor. . . . At Common Law, joint tenants must take at the same time; and under limitations to persons in contingency coming *in esse* at different periods, the first taker would take the whole: 13 Rep. 57, *Windham's Case* (3).

(1) 4 De G. & S. 162. (2) 11 Hare, at p. 201. (3) 5 Rep. 72.

But under conveyances to uses the *cestui que use* may take at several times. The estates vest in those who first come *in esse*, and open and divest as others come *in esse*." Why then, as the trusts here are those in the first instance for the husband and wife and existing children, should not on the intent the trust be opened as each child of the marriage comes into being, and that child be added as a *cestui que trust*? I see nothing in principle against that, and in effect the Vice-Chancellor has so decided. It would certainly seem also that the children of the marriage are objects of the power of advancement to the extent of £500.

It makes no difference whether or not the children of the first marriage are or are not within the marriage consideration. If they are not, a purchaser for value may defeat their interest, but the assignees take only the estate of the grantor.

PORTER, M.R. :—

I am of the same opinion, and for the same reasons. I think *Kenworthy* v. *Ward* (1), mentioned by the Lord Chancellor, virtually rules this case. The cases cited by Mr. Roche are no doubt important within their sphere of application, and I know nothing to weaken their authority in the case of Common Law assurances. It is of course quite settled that there cannot be a Common Law conveyance to an unborn person. But here there is no conveyance to an unborn person. On the contrary, there is a complete and exhaustive conveyance at Common Law to the trustees. The only question is as to the trusts upon which they are to hold the property. It is quite established that the rule affecting estates which take effect under the Statute of Uses, or as equitable interests by virtue of the doctrine of trusts, is quite different from that which applies to estates limited conformably to the Common Law. In his very scientific and valuable little treatise on the Common Law, Uses, Devises, and Trusts, Mr. Hayes states the settled rule upon this subject in the way in which I have always understood it. He says (p. 44) :—"At the Common Law, a conveyance to the first unborn son of A, and a conveyance to A, for a term of years, and, on the determination of the term, to the first unborn son of A, are

(1) 11 Hare, 196.

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alike void, and *that* for the very *same* reason, namely, the suspense of the freehold. But, under the doctrine of uses, the limitation of an estate of freehold, to commence *in futuro*, is good; and as the circumstance of its being preceded by a chattel interest would not render it either more or less unpalatable to the Common Law, so that circumstance cannot affect its validity as a springing use. Since a vested estate for life or in tail, created by or under the given instrument itself, is, as we have seen, a necessary preliminary to the existence of a freehold remainder, whenever a freehold limitation at the Common Law is found to be neither immediate nor immediately expectant on such an estate, so created, we may certainly conclude that the limitation is void, as not being, even in point of intention, a remainder (a freehold limitation expectant on an estate for years, being here treated as equivalent to an immediate limitation of the freehold); and whenever we find a freehold limitation, by way of use or devise, similarly circumstanced, we may as certainly conclude, that the limitation (unless obnoxious to the rule against perpetuities) is valid as an executory use or executory devise. In short, all uses, limited agreeably to the Common Law, are good, on Common Law principles; all uses not so limited (if observant of the rule against perpetuities) are good, on principles peculiar to uses." Of course in this case the conveyance does not operate by virtue of the Statute of Uses; but the same author at p. 71 of the same work points out that trusts may be limited in any manner in which uses can be created and enforced. He says:—"As trusts, then, limited agreeably to the Common Law, reject its harsher rules, so trusts are, *a fortiori*, susceptible of all those irregular forms of which uses admit. Springing and shifting or future trusts are, therefore, allowed without any other limit than that, which, on broad grounds of policy, the rule against perpetuities has assigned to all limitations." This is a concise and compendious statement of the law applicable to trusts. In the present case no attempt has been made to create a trust which would violate the rule against perpetuities. The equitable estates in the *cestuis que trustent* must take effect, if at all, within legal limits. There is no legal objection to effectuating the plainly expressed intention of this instrument. I am therefore of opinion that the trust in favour of the unborn children of the marriage is

valid, and that the class of unborn children entitled under it will if necessary open from time to time, so as to admit new members, according as they come into being. Their rights cannot therefore be defeated in the way attempted.

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FITZ GIBBON, and BARRY, L.JJ., concurred.

Solicitor for the assignees of Thomas Slattery: *Tweedy.*
Solicitor for the trustees of the settlement: *O'Hea.*
Solicitor for Mrs. Slattery: *Dunlea.*

G. Y. D.

RUDD *v.* RUDD (1).

Appeal. 1894.
June 5, 6.
July 5.

Will—Advancement clause—Statute of Limitations.

A testator bequeathed the residue of his property to trustees, upon trust to sell his interest in the lands of C., and to call in certain sums of money, and to invest in the funds a sum of £1800 for the benefit of his six daughters, and as each of them should marry with consent of the trustees, or require her portion for the purpose of advancing herself in life, then with the like consent to pay such daughter £300.

The testator died in 1854; the trustees renounced and disclaimed; and administration with the will annexed was granted to the testator's widow.

The plaintiff, one of the daughters, went to Dublin about 1860, and assisted a friend to carry on the business of a milliner. In 1875 the friend, who owned the business, died or retired, and the plaintiff wished to acquire the business, and employed a solicitor, who demanded payment of her share. The share was not paid. In 1885 the plaintiff took a house in Dublin, where she supported herself by setting lodgings, and, in 1891, the house was purchased for her by some friends. She then brought an action to recover her share:—

Held (affirming the decision of the Vice-Chancellor), that the right to receive her share accrued to the plaintiff in 1875, and that her claim was barred by the Statute of Limitations.

THOMAS RUDD, by his will, dated the 17th April, 1854, after reciting that he was possessed, and in occupation, of part of the lands of Clone, Tomsallagh, and Clohaston, which he held under the Earl

(1) Before WALKER, C., SIR P. O'BRIEN, C.J., and BARRY, L.J.

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of Portsmouth, and was entitled to £200 out of the estate of Thomas Rudd, and to £100 due to him by William and Clement Roice, after certain specific bequests, bequeathed as follows:— "As to all the rest residue and remainder of said lands, chattels, moneys, and securities, I leave, devise, and bequeath the same, and every part thereof together with all other property of what nature or kind soever the same may be of which I shall die seized, possessed of, or entitled to, unto my friends, G. C. Roberts, Joseph Haughton, and M. Hinch, and to the survivors and survivor of them, and to their heirs, executors, and administrators of such survivors upon the trusts, and to and for the following uses, intents, and purposes . . . . to sell and dispose of my interest in the lands of Clohaston to the best advantage; and to call in and recover the sums of £200 and £100 due me by Thomas Rudd and William and Clement Roice, respectively, and to invest in the funds the sum of £1800 for the benefit of my six daughters, Elizabeth, Mary, Anne, Catherine, Susan, and Lucy, and as each of my said daughters shall marry with the consent of my said trustees, or require her portion for the purpose of advancing herself in life with like consent and approval, then to pay such daughter so marrying or advancing herself the sum of £300 out of said monies so invested as aforesaid; and should any of my daughters die unmarried then to divide her portion amongst such of my surviving daughters as shall at the time be unmarried, and to apply the annual dividends of said invested money to clothe my said daughters until they shall respectively receive their portion of said principal sum of £1800 so invested as aforesaid." The testator appointed his son Thomas Rudd his residuary legatee, and G. C. Roberts, J. Haughton, and M. Hinch, trustees and executors of his will.

The testator died on the 16th August, 1854, leaving him surviving his widow, Elizabeth Rudd, his said six daughters, none of whom were married at the date of his death, and five sons, Thomas (the defendant), Launcelot, and three other sons.

The executors renounced and disclaimed, and letters of administration, with the will annexed, were granted to Elizabeth Rudd, the widow, on the 26th of May, 1855. She entered into possession of Clohaston and the other farms of the deceased, and

remained in possession until the majority of Launcelot Rudd. The said lands were never sold, pursuant to the directions of the will, nor was the sum of £1800, or any part thereof ever raised out of the lands or invested. Susan Rudd and Lucy died under age, and unmarried; Elizabeth and Mary Rudd were married and received their portions; Catherine Rudd also received her portion.

By deed, dated the 20th December, 1860, Mrs. Elizabeth Rudd assigned the said lands to the defendant in consideration of £455. This money was not in fact paid, but the defendant gave to Elizabeth Rudd his bond, with warrant to confess judgment for £455, which bond was never paid. Some years after it was agreed between Elizabeth Rudd, Launcelot Rudd, and the defendant, that in consideration of the defendant giving up to the said Launcelot Rudd possession of part of the lands of Clone, called Dockrell's Farm, and all his claim therein under the will of Thomas Rudd, deceased, the bond and warrant of the defendant executed to secure the payment of the said sum of £455 should be given up to be cancelled, and that Launcelot Rudd should execute his bond with warrant of attorney to confess judgment thereon to secure the payment to the said Elizabeth Rudd of the said sum of £455. Accordingly Dockrell's farm was handed over to Launcelot, and on the 6th April, 1874, he executed his bond with warrant of attorney to Elizabeth Rudd for £1100, to secure payment of the £455, and £100 lent by Elizabeth Rudd to the said Launcelot Rudd.

By a deed of release, dated the 27th April, 1874, Elizabeth Rudd released the defendant, his lands, goods, and chattels, from payment of his bond and warrant, dated the 20th December, 1860. By deed, also dated 27th April, 1874, made between Launcelot Rudd of the one part and Elizabeth Rudd, of the other part, Launcelot Rudd charged the lands of Clone, and all other lands devised to him by the will of Thomas Rudd, with the trusts in favour of Elizabeth Rudd and her unmarried daughter.

The plaintiff, Anne Rudd, was no party to any of these transactions, and she claimed that they were in derogation of her rights. A new lease of the lands was obtained by the defendant from Lord Portsmouth in 1858, which the plaintiff claimed was a graft on the previous interest. The tenant had only a right to

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sell subject to the approval of the landlord. That was the custom on the estate, but a sale by public auction was not permitted.

After the testator's death, the plaintiff lived for about five or six years with her mother. She left some time before 1860 and came to Dublin, where she lived with a friend, who carried on business as a milliner in Molesworth-street. The plaintiff acted as assistant in the business until about 1876, when her friend died. Having then an opportunity of acquiring the business, the plaintiff, through a solicitor, made a demand for payment from her mother: this was done at the end of 1876 and the beginning of 1877. The plaintiff was paid interest on her portion down to 1877.

Elizabeth Rudd died in 1885. Launcelot died in 1887, and his assets were administered in Chancery in a creditor's action of *Williamson* v. *Rudd*; but no claim was made on the bond. In 1885 the plaintiff took a house in Gardiner-street, Dublin, and supported herself by letting lodgings. In 1891 she purchased this house for £240, which she borrowed from friends. No interest had been paid to the plaintiff, on her portion since 1877, nor had she made any further demand for payment. On the 24th February, 1893, the present action was brought by Anne Rudd against Thomas Rudd to carry out the trusts of her father's will, and for a declaration that the lands of Clonhaston in the hands of the defendant were subject to the trust in the will for the daughters' portions.

The defendant pleaded the Statute of Limitations, and also *laches* and acquiescence, asserting that the plaintiff was well aware of the family arrangements contained in the deeds of 1860 and 1874. On the 27th January, 1894, the Vice-Chancellor gave judgment for the defendant, and dismissed the action: from that order the plaintiff appealed.

Price, Q.C., and *Griffin*, for the appellant:—

There were two conditions on which the plaintiff could demand her portion—on her marriage, or for her advancement in life. The only occasion upon which she desired her portion for advancement was in 1891, when the house was bought for her. There was no opportunity for an advancement in 1876, because the plaintiff had not concluded contract to buy the business for her-

self, and she would not have been able to sustain an action for her share. If the business had been actually set up for her, it would have been otherwise: *Talbot* v. *Marshfield* (1). As to what is an advancement, see *Taylor* v. *Taylor* (2); *Blockley* v. *Blockley* (3); Jarman Wills, 5th ed., 891. The claim is not barred by the statute, as the right to receive only arose in 1891. There was here an express trust for raising these portions: *Carey* v. *Cuthbert* (4). The plaintiff was no party to the family arrangement and was not bound by any acquiescence.

Serjeant Jellett, Q.C., and *Wakely* (with them *Matheson, Q.C.*), for the respondent:—

There are two questions to be determined: 1, the defence of laches and acquiescence; 2, the Statute of Limitations:—As to 1, this is a stale demand, and an attempt to rip up the family settlement of 1874. The lands of Clohaston were held under a yearly tenancy, and could not be sold by public auction under the rule of the estate; but on a valuation being made, a sale was allowed by the landlord to a son of the deceased tenant. The valuation was made at £450; but as no member of the family was able to pay £450, a bond was given for the amount by the defendant, who then got a lease from Lord Portsmouth for one life, and a term of twenty-one years. That was done in 1858 with the concurrence ot Elizabeth Rudd; aud the other members of the family of course knew of it. There was no express trust created between the beneficiaries under the will and Thomas Rudd; they had a mere equity to assert against the legal title which came to him: *Petre* v. *Petre* (5). Subsequently there was another arrangement by which Launcelot was to take over the debt of £450, and he gave his bond instead of Thomas. There was a large expenditure of money on the farm by the defendant, and after that, the lapse of time, the expenditure of money and loss of evidence, the case cannot be opened: *Attorney-General* v. *Fishmongers' Co.* (6); *Bright* v. *Legerton* (7). But the claim is

(1) L. R. 3 Ch. 622.
(2) L. R. 20 Eq. 155.
(3) 29 Ch. Div. 250.
(4) Ir. R. 7 Eq. 542.
(5) 1 Drew. 371.
(6) 5 M. & C. 15.
(7) 2 De G. F. & J. 606.

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barred by 37 & 38 Vict. c. 57, s. 6. The present right to receive money is a present right, as distinguished from a reversionary interest; the present right was the time when the plaintiff made the demand in 1876: *Hornsey Local Board* v. *Monarch Investment Building Society* (1); Roper on Legacies, vol. i., p. 808.

July 5.

WALKER, C.:—

Thomas Rudd by his will dated the 17th April, 1854, after reciting that he was possessed of part of the lands of Clone, Tomsallagh, and Clohaston, which he held under the Earl of Portsmouth; and part of the lands of Grange and Clondow, under Lady Grady; and an annuity of £18 9*s.* 3*d.* payable out of Tinnanors; and to £1300 in cash; and to £200 out of the estate of Thomas Rudd; and £100 due by William and Clement Roice, devised to his son Thomas all his interest in Grange and Clondow; and then the testator bequeathed the residue as follows:—

[His Lordship read the clause in the will, *ante*, p. 16.]

The will contained specific devises of his farms of Clone and Tomsallagh. Thomas Rudd died on the 16th August, 1854; the executors renounced and disclaimed the trusts; and on the 26th May, 1855, administration with the will annexed was granted to Elizabeth Rudd the widow. The six daughters of Thomas survived him, and also five sons, including Thomas and Launcelot. Susan and Lucy died under age, and unmarried; Elizabeth and Mary married, and received their portions; and Catherine also received her portion.

The lands of Clohaston were held from year to year under Lord Portsmouth. Elizabeth Rudd the widow entered into possession of them, and remained in possession till Launcelot attained his majority.

By deed dated the 20th December, 1860, Elizabeth Rudd assigned the lands of Clohaston to the defendant Thomas, in consideration of £455, the assessed value of the lands, and this was secured by the bond of the defendant to Elizabeth. Subsequently a deed of family arrangement was entered into, by which the

(1) 24 Q. B. Div. 1.

defendant gave up to Launcelot part of the lands called Dockrell's Farm, and Launcelot executed to Elizabeth Rudd his bond for £455 in substitution for the bond of the defendant.

By deed dated the 27th April, 1874, Elizabeth Rudd released the defendant from his bond, and by deed of equal date Launcelot charged the lands of Clone and all other lands devised to him by the will and codicils of Thomas Rudd, with the trusts in favour of Elizabeth Rudd and her unmarried daughters. It appears that in 1858 the defendant obtained from Lord Portsmouth a lease of Clohaston.

The plaintiff Anne was born in August, 1839; and some time before 1860 she left her home under some circumstances which do not appear, and went to Dublin, where she lived with a friend in Molesworth-street, a milliner, assisting her in business and keeping the accounts, receiving a yearly salary. It also appears that in the year 1876 the lady with whom the plaintiff lived died, or went out of business, and the plaintiff required her money, as she had the opportunity of acquiring the business; and on the 14th November, 1876, she employed Mr. O'Flaherty, a solicitor, to write to her mother. He wrote:—"I would ask you for a settlement of her claims under her father's will, as she has now an opportunity of advancing herself in life."

In October, 1876, hearing that a sale of Clone was contemplated, she wrote expressing a hope that her claim would be paid. Mr. Corcoran who was acting as solicitor for the family, replied on the 23rd October, 1876:—"You can recover the sum left you by your father by legal proceedings, which I hope your family will try to avoid." On the 23rd May, 1877, Mr. O'Flaherty again wrote on her behalf, referring to his former letter, and asking what were Mrs. Rudd's instructions? She was paid interest to 1877, and some through Launcelot.

Elizabeth Rudd died in 1885, and Launcelot also died, and his assets were administered in Chancery in a creditor's action of *Williamson* v. *Rudd;* and a judgment on further consideration was pronounced in 1885. No claim was made on the bond. No demand was made by the plaintiff for payment since 1877; nor did she receive any interest for more than twelve years before the

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action. The present action was instituted on the 24th February, 1893. In 1885 she took a house in Gardiner-street and supported herself by letting lodgings; and in 1891 she purchased the house for a sum of £240, which she borrowed from friends.

The defendant, in addition to the defence of Statute of Limitations, relied upon the defence of *laches* and acquiescence, and asserts that the plaintiff was aware of the family arrangements contained in the deeds of 1860 and 1874, and that she is now precluded from resorting to the defendant or Clohaston. I do not think this would constitute a defence in the present case, having regard to all the facts. But I feel compelled to hold that the Statute of Limitations furnishes an answer to the present claim against the defendant.

The argument on the part of the plaintiff is that she in 1891, for the first time, required her portion for the purpose of advancing herself in life, having then bought the house and borrowed its purchase-money.

Turning to the will the trustees disclaimed, and their consent and approval must be left out of consideration; and the question is—Did she, in 1876, require her portion for the purpose of advancing herself in life? She claimed it on that ground in 1876, as appears by her evidence and the letter of her solicitor; and the facts show she did so require it—the occasion and good opportunity had arisen. Mr. Price contended that time did not run from 1876, because a complete contract for the purchase of the business had not been made, and the matter rested in negotiation only; and as a logical consequence that if she had brought her action in 1876, stating the facts and alleging that she required her portion to advance herself in life, the action would have been dismissed. I cannot assent to that argument. I think on the facts a present right to receive the share arose in 1876, that time runs from that, and as it is not alleged there is anything which having regard to recent legislation would prevent it running, she is now barred by the statute.

I should be better pleased to have been able to arrive at a contrary conclusion; but the question is one of law to which we are bound to give effect, and, in my opinion, the decision of the Vice-

Chancellor on this branch of the case was correct, and the appeal must be dismissed. *Appeal.* 1894.

The Lord Chief Justice, who heard the case with Lord Justice Barry and myself, concurs in the result at which I have arrived. RUDD v. RUDD.

BARRY, L.J., concurred.

Solicitor for the plaintiff: *P. A. Chance.*
Solicitors for the defendant: *Fox & Corcoran.*

R. D. M.

HAVERTY *v.* CURTIS.

(1893. No. 967.)

M. R. 1893. Dec. 20, 21. 1894. Jan. 13.

Settlement—Portion—"Payable on marriage, or at such time as settlor should appoint"—No appointment—Held vested, subject to divesting on death unmarried—Misrecital in will not an execution of power.

A, by settlement on the occasion of his second marriage, conveyed lands to trustees, upon trust to raise a sum of £600 for B, a daughter of his first marriage, "to be paid and payable to her on her marriage, or to be payable at such other time as he should by deed or will appoint"; and, subject thereto, upon the usual trusts for the wife and children of the second marriage.

A, by his will, bequeathed all his property to C, the surviving child of his second marriage, reciting that he made such disposition considering that B had been sufficiently provided for by his marriage settlement, under which she would be entitled to receive the sum of £600 after his death. B survived the testator, and was unmarried:—

Held, upon the construction of the settlement, that B was entitled to a vested interest in the sum of £600, liable to be divested in the event of her dying without having been married, and that the incorrect recital in the will was not an exercise of the power of appointment

ADJOURNED SUMMONS.

This was an application by way of originating summons on behalf of the plaintiff, Lina Haverty, *cestui que trust* under a settlement of December 10th, 1860, made on the second marriage of Martin Haverty, for a declaration—1, that the defendant Mary Haverty, the surviving child of the first marriage of Martin

M. R. 1893.

HAVERTY v. CURTIS.

Haverty was not entitled to a vested interest in the sum of £600, charged upon the lands in the settlement; and, 2, that no interest was payable to her unless and until she should marry. The other defendants were Robert Curtis and Catherine Curtis, the trustees of the settlement. The facts of the case are fully set out in the judgment of the Master of the Rolls.

Kenny, Q.C., and *Philip White*, for the plaintiff Lina Haverty:—

As to 1, the £600 is a portion charged on real estate, and does not vest till it becomes "payable," *i.e.* on marriage, or at a time appointed by the settlor: Theobald on Wills, p. 380. The erroneous recital in the will is not an exercise of the power of appointment: *L'Estrange* v. *L'Estrange* (1); *Re Webster's Trusts* (2); Farwell on Powers, p. 194.

As to 2, the owner of the lands charged is not bound to pay interest on the portion before the period of vesting, or time for payment, which are here the same. It makes no difference whether the portion is secured by settlement or by will: *Smith* v. *Smith* (3); *Lord* v. *Lord* (4); Theobald on Wills, p. 131.

Piers White, Q.C., and *M'Cann*, for the defendant Mary Haverty:—

Mary Haverty is entitled to the principal sum of £600, and interest thereon as a paramount charge on the estate of Lina Haverty, who has paid interest on the amount till 1890. This is an exceptional case; if there was no will the Court will not, on the construction of the settlement, deprive the defendant of the provision conferred by it, because it is charged on land, and is not raiseable until the occurrence of a particular event. The settlement and will should be read together.

The settlor recognizes a duty to provide for the children of his first marriage. The settlement was for valuable consideration, and should be treated as a money settlement. The covenant for further assurance could be enforced against the plaintiff as his

(1) 25 L. R. Ir. 399.
(2) 1 L. R. Ir. 320.
(3) 2 Vern. 91.
(4) L. R. 2 Ch. 782.

executrix, who also takes the ultimate interest in the property. The portion having been created by the settlement, all the settlor had to do was to indicate the time when it was to be paid. The clause in the will is inartificially framed, but the evident intention was to exercise the power, and indicate that it was to be paid on his death: *Re Morgan* (1); *Minchin* v. *Minchin* (2); *Pennefather* v. *Pennefather* (3); *L'Estrange* v. *L'Estrange* (4); Farwell on Powers, p. 194. Even if the will was not an exercise of the power, the portion vested at the death of the settlor at latest. But for the merger clause it would have vested at the date of the settlement. Payment was postponed for the convenience of the estate. This is an exception to the rule, that in the case of portions charged on real estate the time for payment is the time of vesting. It is not like the cases where it was held that the personal representative of a deceased child was not entitled to the portion, because it was not wanted; here it is wanted. In any case the defendant is entitled to interest. [They cited on this branch of the case *Mayhew* v. *Middleditch* (5); *Hinchinbroke* v. *Seymour* (6); *Smith* v. *Partridge* (7); *Lowther* v. *Condon* (8); *Remnant* v. *Hood* (9); Mathew on Portions, p. 10; Vaizey on Settlements, p. 78; Norton and Elphinstone on Deeds, p. 375.]

Philip White, in reply:—

The argument for the defendant assumes that she is to be treated as a purchaser under the settlement; but this is not so: *Re Cameron and Wells* (10). The charges created by the settlement are not paramount. The £600 charged in favour of the defendant is to be paid upon marriage, and is therefore in the nature of a contingent gift: *Atkins* v. *Hiccocks* (11). As regards interest the settlor may well have intended that the defendant should not have any benefit unless she married. The *onus* is on the defendant to show that there was an intention to exercise the power.

(1) 7 Ir. Ch. R. 18.
(2) Ir. R. 5 Eq. 258.
(3) Ir. R. 7 Eq. 300.
(4) 25 L. R. Ir. 399.
(5) 1 Bro. C. C. 162.
(6) *Ibid.* 395.
(7) Amb. 266.
(8) 2 Atk. 127.
(9) 2 De G. F. & J. 396.
(10) 37 Ch. Div. 32.
(11) 1 Atk. 500.

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Jan. 13.

THE MASTER OF THE ROLLS:—

By indenture of marriage settlement dated the 16th December, 1860, and made between Martin Haverty of the first part, John Rogers of the second part, Kate Mary Rogers of the third part, Gwendoline Haverty and Mary Haverty (one of the defendants) of the fourth part, and Michael Fitzgibbon and Francis Sullivan (trustees) of the sixth part, the lands of Kilbehy, containing about 247 acres statute measure in the county Limerick, of which Martin Haverty was owner in fee, were put in settlement, on the occasion of his second marriage with Miss Rogers. By his first marriage he had two daughters, Gwendoline and Mary, of whom Mary, who is unmarried, is the survivor, Gwendoline having died in 1873. The defendants Robert Curtis and Catherine Curtis have been appointed and now are the present trustees of the settlement, one of the original trustees having died, and the other having declined to act. The settlement, which is a very badly drawn instrument, recites that a marriage was contemplated between Martin Haverty and Kate Mary Rogers, and that John Rogers, the lady's father, had agreed to give to Martin Haverty the sum of £500 as a marriage portion with his daughter, and that Martin Haverty had agreed to settle the said lands of Kilbehy "upon the said Kate Mary Rogers and the issue of the marriage, if any," as thereinafter expressed "subject to the charges thereout in favour of his daughters the said Gwendoline and Mary Haverty" as thereinafter expressed; and, after reciting that John Rogers had paid to Martin Haverty the said sum of £500, the deed witnesses "that in pursuance of the said agreement and in consideration of the said sum of £500 paid to the said Martin Haverty, and in order to make a provision in life for the said Kate Mary Rogers and the issue of the said marriage, if any, and in further consideration of the sum of 10*s.* each paid by the said Michael Fitzgibbon and Francis Sullivan to the said Martin Haverty, he the said Martin Haverty doth grant to the said Michael Fitzgibbon and Francis Sullivan all that and those the town and lands of Kilbehy, to hold unto the said Michael Fitzgibbon and Francis Sullivan their heirs and assigns for ever, upon trust out of the said lands to raise two several sums of £400, one of which is to be paid

and payable unto each of them the said Gwendoline Haverty and Mary Haverty upon their marriage, provided such marriage, if it takes place in the lifetime of the said Martin Haverty, shall be with the full consent of the said Martin Haverty, or to be payable at such other time or times as the said Martin Haverty shall by deed or will appoint, but neither of the said sums to carry or bear interest during the lifetime of the said Martin Haverty, or unless the said Martin Haverty shall sooner appoint, the said interest not to exceed the rate of five per cent. per annum, and, subject to the said two several charges of £400 and £400, that the said trustees, or other the trustees or trustee of these presents, shall stand and be seized of the said lands upon trust to receive and pay the rents and profits thereout to the said Kate Mary Rogers, during her life, for her separate use and free from the control of the said Martin Haverty, or any other husband with whom she may hereafter intermarry, and from and after the decease of the said Kate Mary Rogers, to pay the said rents to the said Martin Haverty during his life, and after the death of the survivor of them, upon trust as to the said lands and the annual profits thereof (subject to the said two several charges of £400 for them the said Gwendoline Haverty and Mary Haverty as aforesaid) that the said trustees shall stand possessed of the said lands and the annual profits thereof for the children, issue of the said marriage, in such shares and proportions as the said Martin Haverty and Kate Mary Rogers or the survivor shall appoint, and in default of appointment upon trust for the use and benefit of all such children, their heirs and assigns, equally, and in case there shall be but one such child then upon trust for such one only child absolutely and for ever."

The deed then provides that in default of issue the lands are to be held in trust for the survivor of Martin Haverty and Kate Mary Rogers, and that the trustees are to raise a further sum of £200 each for Gwendoline and Mary Haverty, if then living, so as to secure to each of them the sum of £600 in all, to be charged upon and payable out of the said lands in the same manner as the charge of £400 each; and then comes the following provision:—"If either of them shall die before their respective days of marriage or other time limited for the payment to them of the said several charges or sums of £400 and £400 as aforesaid, then the charge so made

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in favour of the daughter or daughters so dying shall cease and determine and merge in the inheritance and reversion of the said lands, but the amount in such case payable to the survivor of them shall be increased to £600, and be charged and chargeable upon the said lands, and payable in like manner and form as is hereinbefore mentioned in relation to the said first-mentioned sum of £400." Then comes a clause empowering Kate Mary Rogers, in the event of no issue and of her predeceasing Martin Haverty, to charge the lands with a sum of £500 for such persons as she may appoint. This was probably intended to go against the marriage portion of £500 given by her father. The rest of the deed is unimportant.

There were issue of this marriage three daughters, Fanny, Kathleen, and Lina, the plaintiff. Fanny and Kathleen predeceased their father, having died between the date of his will, July 21st, 1880, and that of the codicil to it, January 15th, 1887. Mrs. Haverty, also predeceased her husband, who died on January 18th, 1887. There was therefore only one child of the first marriage, the defendant Mary Haverty; and one of the second marriage, the plaintiff Lina Haverty.

The will of Martin Haverty runs as follows:—"I hereby give and bequeath to my three children Frances, Kathleen, and Lina, all the property real and personal that I may be entitled to, to be divided equally among them, share and share alike, and should one or more of them die before coming of age, I desire that the said property shall go to the survivor or survivors in equal shares as above, and I make this disposition, considering that my eldest daughter Mary has been sufficiently provided for by my marriage settlement, under which she will be entitled to receive the sum of £600 after my death." In the codicil he recites the deaths of his daughters Frances and Kathleen, and leaves all his property to his daughter Lina Haverty, for her sole use and benefit, and appoints her sole executrix as well as sole devisee and legatee.

The charge or charges have not been raised. It appears from the plaintiff's affidavit that after the death of Martin Haverty the plaintiff paid interest to the defendant Mary Haverty for some years upon the sum of £600, being under the impression that it was an actual charge upon the lands bearing interest; but, having

looked into the matter more clarly, her contention now is that the £600 is not payable till the marriage of Mary Haverty, who is still unmarried, and that it carries no interest in the meantime. The present summons is brought to have both questions decided. The amount in dispute is small; but it was stated at the bar that, owing to causes which are of very wide-spread operation, the lands yield little, if any, surplus over and above the amount of the interest upon this charge of £600. The question is therefore one of great importance to both of these ladies, and I have considered it with care.

The contention of Mary Haverty is that, under the settlement itself, the charge of £600 was vested on her attaining twenty-one, whether married or not, and bears interest from the death of her father. It was argued on her behalf that it was raisable at the date of vesting, though, if it had been raised, the interest would have been payable to her father during his life. She further argues that even if under the settlement taken alone, this is not so, yet the will of Martin Haverty is an exercise of the power, reserved to him by the settlement, of appointing some period other than that of her marriage, at which the charge was to be paid, viz. the date of his death; so that her claim is virtually the same in whichever way it is advanced.

Before considering the construction and effect of the instruments, it is clear that the case turns in no degree upon the value of the lands upon which the charge is laid. I do not know what price Martin Haverty paid for Kilbehy when he bought it in the Landed Estates Court, but at the date of the settlement in 1860 he considered it value for at least £1700; because had Gwendoline as well as Mary survived him, and had there been no issue of his marriage with Miss Rogers, the lands would have stood charged with two sums of £600 each, and one of £500. The subsequent depreciation cannot affect the question in any way.

To come then to the settlement, the scheme of it is plain enough. To the extent of the interest, whatever it was, provided for Gwendoline and Mary, or the survivor, it was a voluntary settlement by the father, who naturally wished to make a provision for them when entering upon a second marriage. But whatever the provision was, it was something expressly withdrawn from the

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operation of the deed, so far as it was a deed for value, that is a settlement in consideration of the marriage and of the £500 fortune of Miss Rogers. Miss Rogers and the plaintiff were purchasers, but only of what was provided for them after withdrawing the charge or charges on the lands. The deed may thus be regarded as containing in fact two separate settlements, one voluntary, and the other for value. Thus, while the plaintiff is, to the extent that she derives under the settlement, a purchaser for value, while the defendant is not, that circumstance does not affect the question which is simply, what is the defendant's interest in the charge?

The important point is that in any view the charge in question is a provision or portion for a child by a father. The first trust declared in respect of the lands is thereout "to raise two several sums of £400." There is no reference here to any contingency or condition. The trust is peremptory, unless the words which follow prevent it from being so:—"To be paid and payable unto each of them the said Gwendoline Haverty, and Mary Haverty, upon their marriage, provided such marriage, if in the lifetime of the said Martin Haverty shall be with his consent, or to be payable at such other time or times as he shall by deed or will appoint." Then follows this direction:—"But neither of said sums to carry interest during the lifetime of the said Martin Haverty, or unless he shall sooner appoint." It is only then, and "subject to the said two several charges" that the marriage settlement properly so called commences, providing successive life estates for the wife and husband; and, after the death of the survivor, "subject to the said two several charges of £400 for them, the said Gwendoline Haverty, and Mary Haverty as aforesaid," for the issue of the marriage in the manner I have already read, and to which I shall have to advert again on the other branch of the case. Should there be no issue of the marriage (an event which would be conclusively ascertained at the death of husband or wife, whichever died first, or within the usual period after the death of the husband if he died first), then, "upon this further trust, to raise thereout for each of them the said Gwendoline Haverty and Mary Haverty, *if then living*, a further sum of £200 each to be added to the said sum of £400 each, so that the whole

amount payable to each of them . . . shall in the event of there being no issue of said intended marriage amount to and be the sum of £600; and same in such event is hereby expressly charged upon and shall be payable out of said lands in manner and form as is hereinbefore mentioned with respect to said first mentioned charge of £400 each."

It is impossible to doubt that the intention here was to substitute £600 for £400, if there was no issue of the marriage, and that the added £200 is to be payable in the same event as the original £400; yet this clause makes the £200 payable to each of them "*if then living*," with no reference to marriage as part of the contingency, unless the words "in manner and form," &c., import it by reference. The whole frame of this clause, however, is so precise as to payment to them "*if then living*" (*i.e.* when the absence of issue of the marriage should be ascertained as a fact), that if any meaning can be put upon the previous part of the deed which will not involve the additional contingency of marriage, that meaning should be adopted.

The clause which follows is in these words:—"But these presents are upon this further and express condition that if either of them, the said Gwendoline Haverty or Mary Haverty shall die before their respective days of marriage, or other time limited for the payment to them of the said several charges or sums of £400 and £200 as aforesaid, then the charge so made in favour of the daughter or daughters so dying shall cease and determine and merge in the inheritance and reversion of the said lands; but the amount in such case payable to the survivor of them shall be increased to £600, and be charged and chargeable upon the said lands, and payable in like manner and form as is hereinbefore provided in relation to the said first mentioned sum of £400." This sentence does not materially affect the question I am at present considering, save in this way, viz. the proviso that a charge is in a certain event to "cease and determine" is rather more consistent with the view that the charge was vested, subject to divesting in the specified event, than with the alternative construction of there never having been a vested charge at all. It would not be safe, however, to rest too strongly on this argument; for no doubt the clause is not altogether inconsistent with either view. It was

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suggested that the use of the word "survivor" limited the operation of the proviso to the case of the one who should first die, and that in the event that has happened the defendant Mary is not subject to it. But I cannot adopt this view, as I think the meaning is that it applies to both ("daughter or daughters so dying," &c.). The clause is infamously drawn not only in this respect, but since it applies to the event in which the charges would be £600, as well as that in which they would be only £400; and in the former case there would be no increase under it at all. Not much turns upon the rest of the deed; for I am unable to follow Mr. White's argument, founded upon the covenant for further assurance. That covenant is meant to further assure what the deed does, not to further assure the doing of something which the deed otherwise does not purport to do. Thus it leaves the question where it was.

We come back then to this, is the increased charge of £600 in the events which have happened vested for all purposes; or is it only so vested as, though carrying interest, not to be raisable save in the event of the defendant Mary Haverty marrying, and liable to be divested, in the event of her dying unmarried; or, as plaintiff contends, has it never as yet vested at all?

The plaintiff's argument depends on the meaning to be placed upon the words "to be *paid and payable*, . . . upon their marriage . . . or to be *payable* at such other time or times as the said Martin Haverty shall "appoint," in the context in which they occur.

"Paid and payable" means no more than payable, as this clause itself shows, in which both forms of expression occur; and "payable" in reference to portions is a very elastic word, capable of meaning "vested" if the contest requires it, but primarily referring to the time of actual payment, whether the portion is or is not antecedently vested. As I had occasion to discuss at length in *M'Call* v. *M'Call* (1), "payable" is a word of flexible meaning. For that proposition it is not necessary to go beyond *Massy* v. *Lloyd* (2) in the House of Lords: see Lord Westbury's judgment at pp. 267-268; but I may also mention *Walker* v. *Main* (3), and *Mocatta* v. *Lindo* (4). It follows that notwithstanding the language

(1) Not reported.
(2) 10 H. L. Cas. 248.
(3) 1 Jac. & W. 8.
(4) 9 Sim. 56.

used in this deed vesting, and not merely payment, might be postponed till marriage, &c., but that is all. Something more is required to show that vesting is in fact postponed. It is to me inconceivable that such can have been the intention. This is a deed by a father, making a provision for his daughter—a provision of which, after his death, she would be in greater need if unmarried than if married. It cannot have been meant that she was to marry or starve. The charge for her is not to bear interest during his life; the inference being almost irresistible that it is to bear interest afterwards. The additional £200 is in terms made payable in an event unconnected with marriage. There is an express clause divesting the portion, and causing it to *cease* on the non-occurrence of the only event on which by the hypothesis it could vest. Had the estate remained of the value which it represented at the date of the deed, no one would have dreamt of raising such a question, though the law would have been precisely the same. The presumption in favour of early vesting, illustrated by *Emperor* v. *Rolfe* (1), *Wakefield* v. *Richardson* (2), *Currie* v. *Larkins* (3), and the like, also favours the defendant's contention, which is encountered by one argument alone, viz. that the charge is upon real estate, and that, therefore, following the general rule, the time for payment is the time of vesting: *Prowse* v. *Abingdon* (4); *Evans* v. *Scott* (5). In the latter case the Lord Chancellor says:—"It is a well-established rule as to portions or legacies payable out of lands that if made payable at a certain age, or marriage, or other event personal to the party to be benefited, and such party die before that time arrive, the portion or legacy is not to be raised out of the land; but if the payment is postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate, out of which the portion or legacy is to be paid, such as the death of a tenant for life, then it will be raisable after the death of the tenant for life, although the term out of which it was to be raised had not arisen in consequence of the party to be benefited not having been *in esse* at the time of the death of the tenant for life."

(1) 1 Ves. Sen. 208.
(2) 13 L. R. Ir. 17.
(3) 4 D. F. & J. 245.
(4) 1 Atk. 245.
(5) 1 H. L. Cas. 57.

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The general rule is, however, subject to exceptions. If the period of payment is fixed from regard to the circumstances of the estate or those from time to time in enjoyment of it the rule will not apply. In *Smith* v. *Partridge* (1), where the question arose whether the representatives of a daughter, who died in the life-time of her father, were entitled to a sum of money charged on the father's estate, the estate being settled on himself for life, remainder to his wife for life, remainder to trustees for term of years, the trusts of which were to raise within or at the end of one year from the death of the settlor and his wife for his daughter, her executors, administrators, and assigns, £850, to be at her or their absolute disposal, the Master of the Rolls says:—"The postponing was merely for the convenience of the father and mother, and the estate, that it should not be raised till after their deaths, but it was intended to vest immediately, otherwise there would have been inserted the words "if she shall be then living."

Now, in the present case, the direction to pay is not merely in the event of marriage, but at such sooner or other time as the father should appoint, with a direction that interest is not to be raised as against him without his consent. This seems to me to indicate that the leading intention was to suit the convenience of the estate, and to exclude the rule by force of which vesting would be postponed. Martin Haverty was to be the person to decide at what time the portions were to be actually payable; and he must be supposed, at any rate it was in his power, to be guided by his own interest in the matter, or the interests of those who would be from time to time successively in possession of the estate. A direction that a portion is to be raised on the marriage of a child, or at any earlier period that may suit the purposes of the settlor, would be *prima facie* inconsistent with the idea that the charge was not to be vested, so as to be available when wanted. This view is confirmed by the whole instrument, and is in accordance with the "truth and honour of the settlement."

If, then, the postponement implied in the words "to be paid and payable at marriage" be a postponement of payment merely, a deferring of the time for actually raising the charge, some

(1) Amb. 266.

earlier or other time will be that of vesting. In *Remnant* v. *Hood* (1) the charges were upon realty, under a will which empowered Samuel Thorold, the tenant for life, to charge £2000 for younger children, but did not specify the time or times at which it was to be raised. By the instrument exercising the power, Samuel Thorold charged the lands with £2000, for the portion or portions of his younger children, to be raised within three months after his decease, and to be forthwith paid and payable, if one only younger child, to such child; and if more, then "equally between them share and share alike for the portion and portions of all and every such daughters or younger children." It was held that the representatives of the child who attained twenty-one and died before the tenant for life were entitled to a share, though the period of payment had not arrived at her death, on the ground that the portions must be taken to have vested when they were wanted, at twenty-one, or marriage. Lord Justice Knight Bruce threw out a doubt whether they were not vested at birth, so as to let in the representatives of other children who had died under twenty-one, and married in the lifetime of the tenant for life. Lord Justice Turner does not appear to have shared this doubt; and in *Davies* v. *Huguenin* (2), decided three years later, that doubt must be taken to have been removed. In *Remnant* v. *Hood* (1) Lord Justice Turner says:—"It is well settled, as a general rule, that legacies or portions charged on real estate, and payable at a future time, do not vest until the time appointed for the payment of them, but upon the death of the legatee or portioner before that time lapse and sink into the inheritance. This rule, however, though general, is not universal. If the payment of the legacy or portion is postponed, not from any considerations personal to the legatee or portioner, but simply for the convenience of the estate, the legacy or portion may vest notwithstanding the death of the legatee or portioner before the time appointed for payment. The Court seeing the purpose for which the payment was postponed, does not consider the postponement to draw with it the consequences which would otherwise attach upon it. It does not allow a provision which was intended for one purpose to

1) 2 De G. F. & J. 396. 2) 1 H. & M. 730.

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be used for another and different purpose. In such case the postponement of payment not evidencing the intention whether neither the legacy nor portion was in the meantime to be vested or not, the Court is driven to the other parts of the instrument and to its object and purpose, in order to ascertain what the intention, in this respect, may have been. It is for this reason, as I apprehend, that we do not find any uniform course of decision as to the vesting of portions payable at a future time; that in some cases they have been held to vest in children of very tender years; and in other cases only in children who have attained the age or position at which the portion would be required; and, again, in other cases, although the cases of this latter class are, I believe, very rare, only in children who have survived their parents. Each case has depended upon the construction of the particular instrument by which the portions have been given. In the case before us, there can, I think, be no reasonable doubt that the payment of the portions was postponed for the convenience of the estate. The limitations of the settlement seem to me to indicate plainly that the purpose of the postponement was that the estate might not be charged with the portions to the prejudice either of the father or mother; and I think therefore that the time when the portions were to be payable cannot govern the question when they were to become vested, but that the question must be determined on the construction of the other parts of the instrument and upon its object and purpose. There are three periods at which the portions may have been intended to vest; the period of the birth of the children, the period at which they would require their portions, which, according to the usual habit in such cases as evidenced by the usual course of settlement, would be twenty-one, or as to daughters on marriage, and the period of the death of the parents. Looking both to the language and to the purpose of this instrument, I can see nothing which in any way imports that the portions were not intended to vest during the lives of the parents, and to adopt the period of the death as the time of vesting would be to deprive the provision of that certainty which it must, I think, fairly be taken to have been the object of the settlement to secure. It would render the interests of the children contingent upon their surviving their parents, and deprive them of the means of

making any certain provisions for their families during the whole of their parents' lives. This is a result against which the Court has struggled and successfully struggled in many cases, and I think therefore that we should not be justified in adopting this period as the time of vesting, in the absence of anything on the face of the instrument indicating that it was not intended. Between the other two periods it is not, as I have said, necessary for us to decide; but I think it right to state that I lean to the opinion that in this particular case the true period of vesting was at twenty-one years, or as to daughters on marriage. The consequence of holding the portions to vest at birth would be that the shares of children dying in early infancy would go to the parent, thus contravening the purpose of the settlement by giving to the father what was intended for the children; and the Court in these cases seems to have regarded rather the purpose than the words of the instrument. In one of these cases, indeed, the Court seems at least to have carried into effect the purpose of the instrument in opposition to the words; and although in the later cases more weight has been given to the terms of the instrument there can be no doubt that in cases of this nature very great attention must be given to the purpose of the instrument. That doctrine is to be found in the case of *King* v. *Withers* (1), and it may be traced through all the cases. It is to be observed, too, that in this case the instrument merely charges the £2000 for the portions, and does not otherwise purport to give them to the children, so that the vesting seems to be left rather upon the purpose than upon the terms of the instrument. It not being necessary, however, to decide the point, and my learned brother thinking it better that the declaratory part of the decree should be qualified so as to leave the question between these two periods of vesting undecided, I do not dissent from the qualification he has suggested."

But even if this view, depending on the consideration that on the whole instrument the period of payment must not be taken as fixed for the convenience of the child, were incorrect, another argument is relied on by the defendant, viz. that though charged upon land, this is in substance a money fund. Sums charged

(1) Forr. 122.

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upon lands have in some cases been treated as money for the purpose of the rule under consideration when the contention has been as between the persons each claiming the charge as money; but never, so far as I know, where it has arisen between the inheritance and the portioner. The distinction is pointed out by Lord Hardwicke in *Teynham* v. *Webb* (1), and is illustrated by *Howard's Trusts* (2). *Dennis' Trusts* (3), cited in this context by Mr. Elphinstone in his useful work on the interpretation of deeds, does not appear to have any bearing on the question. If it were the case of a fixed charge, payable in any event, belonging as a sum of money to the settlor, and the subject of such limitations or directions as are contained in this deed, I should have no difficulty in holding that the fact of its being charged on lands would make no difference. It would be a money fund. But that is not this case; and I am of opinion, though not without doubt, that the class of cases to which I have referred has no bearing on the present.

The result therefore is, that if the question has to be decided on the deed alone, the defendant Mary Haverty is entitled to a vested interest in the £600, with interest from the death of Martin Haverty, though liable to be divested in the event of her dying unmarried. Obviously under such circumstances it would be contrary to practice and principle to order the charge to be raised in the meantime, or before her marriage.

But another serious point remains. Martin Haverty made a will and codicil. Is the will an exercise of his power to appoint or determine the time at which the portion is to be raised? The words are:—"And I make this disposition, considering that my eldest daughter Mary has been sufficiently provided for by my marriage settlement, under which she will be entitled to receive the sum of £600 sterling after my death." A very slight alteration in the phraseology would have been enough for the defendant's purposes. But without alteration, I fear the will amounts to no more than a statement of what the testator believed would be Mary's rights under the deed, and not to a direction or appointment by him. I say I fear this, because it is really little more than a quibble, and it is perfectly manifest that had he for

(1) 2 Ves. Sen. 207. (2) 7 Ir. Ch. R. 344. (3) 6 Ir. Ch. R. 422.

a moment thought that an appointment was necessary he would have made it.

In Farwell on Powers, p. 194, the principle is thus stated :— "If the donee of a limited power of appointment recites that he has appointed and does no more, this erroneous recital will be evidence of an intention to execute the power. If, however, he recites that an object of the power is entitled to the proper subject of the power, he evidently conceives that the person referred to possesses a title independently of any act of the testator's, and he cannot, therefore, be held to express by such recital an intention to exercise a power disposing of property which he has already declared belongs to the objects independently of him." As an illustration of this the editor refers to *Minchin* v. *Minchin* (1), where it was held that, where a power of appointment was given to A and B jointly and to the survivor of them, and A purported to exercise the power in favour of C, an object, and died before B, a recital in C's marriage settlement, to which B was a party, that C was entitled to part of the fund under the appointment, did not amount to an appointment by B, though he was sole donee of the power, and the settlement was an apt instrument for the appointment, and although the husband of C made a settlement in consideration of the supposed validity of the appointment. I followed that case in *L'Estrange* v. *L'Estrange* (2), the principle being that which was acted on by the Court of Appeal in *Pennefather* v. *Pennefather* (3). An erroneous statement by a testator in his will that by the same will he has given a legacy or the like will operate as a good gift of the legacy; because it appears that he intended by his will to do it, that is to say, he willed it, and the intention to will it appears in the will itself. But no such doctrine (whether it be sound or not) can apply when the erroneous recital or statement is as to an extraneous title.

There is a case, indeed, which I have found since the argument, and which, if well decided, seems to me to go the whole length of the defendant's contention. I refer to *Hall* v. *Lietch* (4). There the testator bequeathed all his personal estate which he should be possessed of or entitled to at his death, with

(1) Ir. R. 5 Eq. 178, 258.
(2) 25 L. R. Ir. 399.
(3) Ir. R. 7 Eq. 300.
(4) L. R. 9 Eq. 376.

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an exception in these words, "save and except the sum of £500 payable at my death, under a policy of insurance to my wife Hannah Hall, and to which she is absolutely entitled under the said policy," to his executors, of whom his wife was one, upon trust for the benefit of his wife for life, and, after her death, of his children then living. The only policy which the testator possessed was a policy on the joint lives of himself and his wife for £500, payable to the testator on his wife's death, if he survived her, and to his legal personal representative on his death, if he predeceased her. His wife had no interest in the policy. It was argued on behalf of the executors, other than the widow, that the testator had excepted the £500 payable under the policy from the general bequest of his personal estate, under the erroneous impression that his wife would be entitled to it under the policy, but that in fact he had made no disposition of it. Malins, V.-C., said:—"I think that this must be construed as showing the intention of the testator that his wife should take the £500 absolutely. If the policy did not give it to her she was to take it under the will. It is just as if a testator had by a codicil disposed of all his personal estate 'except £500, which I have given to A by will,' and he had not given £500 to A, by his will; that would give the £500 to A by implication. The answer to the question, therefore, will be that upon the true construction of the will the £500 is payable to the plaintiff."

But that case does not seem to have been fully argued. No authorities were cited, and the decision seems to me to be more than questionable, and irreconcileable with the decisions in the Court of Appeal in this country. The proposition (as to will and codicil) which Malins, V.-C., puts as self evident seems to be contrary to many cases, such as *Skerratt* v. *Oakley* (1), and *Vaughan* v. *Foakes* (2). I therefore decline to act upon *Hall* v. *Lietch* (3), however strongly it commends itself to one's feeling of what is in a certain sense fair and reasonable. I therefore think the will does not affect the question.

Another view occurred to me as possibly a tenable one. The deed in the events which have happened limits the estate to the

(1) 7 T. R. 492. (2) 1 Keene, 58. (3) L. R. 9 Eq. 376.

plaintiff "absolutely and for ever," and not to the plaintiff and her heirs. True, the estate is an equitable one. But in *Meyler* v. *Meyler* (1), the Vice-Chancellor held that words of limitation (apart from the Conveyancing Act, which does not touch this case) are as necessary to pass an equitable as a legal estate by deed. If so, the plaintiff would, under the deed, be only tenant for life. Under the will, however, and the codicil, she is admittedly as owner in fee; but if so, her title is under the will. It might then be said that if she elects to take under the will, she must give effect to the whole of it, including the recognition of the defendant's title as stated in it. This view, however, was not argued, and indeed it may be that the fee would pass to her by the previous clause, though I believe the one to which I have referred, and which in express terms covers the case that has occurred, is that on which the rights must depend.

I shall make the following order:—

The Court—being of opinion that the said Mary Haverty is entitled to a vested interest in the sum of £600 in the summons mentioned, liable to be divested in the event of her dying without having been married—doth make no order on the said summons; the costs of the defendants, when taxed and ascertained, to be paid by the trustees out of the trust premises, the plaintiff to abide her own costs.

Solicitor for the plaintiff: *J. C. Sullivan.*

Solicitors for the defendant Mary Haverty: *Maxwell, Weldon, & Co.*

W. L.

(1) 11 L. R. Ir. 522.

V.-C.
1893.
Dec. 5, 19.

BLOUNT *v.* VIDITZ.

(1888. No. 10,715.)

Bequest for such charitable purposes as Archbishop should direct—Intention to apply fund for maintenance of Catholic clergyman with direction as moral duty to say Masses—Payment out of Court.

A testator bequeathed personal estate to his executors, on trust to apply same for such charitable purposes as the Roman Catholic Archbishop of Dublin should direct, the trustees to pay such personal estate to him, to be by him applied for such charitable purposes as aforesaid, and his receipt to be an absolute discharge. In a suit to administer the estate, the Archbishop made an affidavit of his intention to apply the legacy for (amongst other purposes) one or more of the officiating Catholic clergymen of his diocese as a contribution in aid of their maintenance and support as priests, and to aid and assist them in their ministry, directing them as a matter of religious and moral duty, not of legal obligation, to say Masses for the testator's soul:—

Ordered, that the fund representing the legacy be transferred to the Archbishop, to be applied by him to the charitable purposes in his affidavit mentioned.

The action was for the administration of the real and personal estate of Arthur James, Viscount Netterville, who died on the 17th April, 1882, and whose will, dated the 30th July, 1879, contained (amongst others) the following clause:—"I bequeath all the residue, if any, of my personal estate to the said John O'Hagan and Alfred John Blount, their executors, administrators, and assigns, upon the trusts hereinafter declared, that is to say, upon trust that my said trustees shall apply the same for such charitable purposes (not being illegal purposes) at such time or times, and generally in such manner, as the Roman Catholic Archbishop of Dublin for the time being shall from time to time in his absolute discretion direct. And I declare that it shall be not only lawful for, but incumbent on, the said trustees upon the request in writing of any such Archbishop to pay the whole or any part of such residuary personal estate to him, to be by him

applied for such charitable purposes as aforesaid, and upon every such payment the receipt of the Archbishop shall be an absolute discharge to the trustees for the amount paid to him, and the said trustees shall not be required or entitled to inquire further into the application thereof."

On a summons to allocate, the Vice-Chancellor, on the 18th July, 1893, declined to pay out the said residue to the Archbishop, the Most Rev. William J. Walsh, as he had not given any direction as to the purposes for which the fund should be applied [see *Hagan* v. *Duff* (1)], and by the allocation order he directed the Accountant-General to carry over the funds representing the said residue to ledger account and separate credit of the legacy of the residue of testator's personal estate for such charitable purposes as the Roman Catholic Archbishop of Dublin should direct.

Dr. Walsh now applied for payment out to him of the funds representing the said residue. The application was grounded on an affidavit in which, after referring to the residuary bequest, he stated:—"It is my intention if and when the fund now in Court to the separate credit representing the said legacy is transferred or paid to me, to direct that after providing for any incidental expenses, it shall be applied to each of the following charitable purposes, or to some of them at my discretion, the amount in each case to be afterwards determined by me, viz.:—

(*a*) To one or more of the officiating Catholic clergymen of the Archdiocese of Dublin, as I may select, as a contribution in aid of their maintenance and support as priests, and to aid and assist them in their ministry, directing as a matter of religious and moral duty, but not so as to constitute any legal obligation or enforceable trust, that each priest so aided and assisted shall say Masses for the repose of the soul of the late Arthur James, Viscount Netterville, the testator herein.

(*b*) For the benefit of the orphanage and school connected with the Convent of Poor Clares, at Harold's Cross, Dublin, for the purposes of that institution.

(*c*) For the benefit of the Magdalen Asylum for Penitent Females, under the care of the Sisters of Our Lady of Charity,

(1) 23 L. R. Ir. 516.

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BLOUNT *v.* VIDITZ.

95, Lower Gloucester-street, Dublin, for the purposes of that institution."

Piers F. White, Q.C., (with him *R. H. Sheil*), in support of the application.

THE VICE-CHANCELLOR said he would make the order for payment.

A question subsequently arose as to the form of the order, and the case was again mentioned to the Vice-Chancellor on the 19th December, 1893, when the order was settled as follows :—

"(Provision for payment of costs, &c. :) And it is ordered that the Accountant-General transfer the residue of the said fund to the applicant, to be applied by him to the charitable purposes in his said affidavit mentioned."

Solicitor for the applicant: *John O'Hagan.*

D. M'C. M.

M. R. 1893.

May 13, 17. June 2.

Appeal. 1894.

Jan. 16–18. June 27.

MORE-SMYTH *v.* MOUNTCASHELL.

Estate pur autre vie—*Special occupant—Executory agreement—Absence of words of limitation—Devolution of estate—*1 *Vict. c.* 26, *s.* 6.

Fee-simple estates stood limited to A (a lunatic, so found by inquisition) for life, remainder to B for life, remainder to C in tail male. For the purpose of purchasing A's life estate B and C agreed, by instrument in writing, that the net income of the estates should, during the life of B, be divided between B and C equally. C having died in the lifetime of B, before the agreement was fully carried into effect, leaving D, his infant son, who became tenant in tail, it was, by a subsequent instrument in writing, agreed between B and E (the widow of C) that all the rights and interests to which, under the preceding agreement, C would have been entitled if he were then living, and the said agreement perfected, should, as between B and D, pass to D absolutely; and by a subsequent deed B, in consideration of the agreements, conveyed his life estate to the use of himself and E, and their heirs, upon the trusts contained in the agreements, with a declaration of trust by E in favour of D of all the estates so conveyed to her. B and D survived A.

Upon the subsequent death of D, *held*, by the Court of Appeal (reversing the decision of the Master of the Rolls), that D's interest in the moiety of B's life estate passed to D's personal representative, and not to his heir-at-law.

PRIOR to the agreement next mentioned, the Mountcashell estates in the counties of Cork and Tipperary stood limited to the use of Stephen, Earl of Mountcashell, for life, with remainder to his first and other sons in tail male, with remainder to the defendant (then Charles William More-Smyth) for life, with remainder to Richard Charles More-Smyth (the first son of the defendant) in tail male, with remainders over.

By an agreement bearing date the 25th November, 1886, made between the defendant, then Charles William More-Smyth of the one part, and Richard Charles More-Smyth of the other part, after reciting that the Earl of Mountcashell was a person of unsound mind so found by inquisition, and that there was then standing in the books of the Accountant-General of the Court of Chancery a sum of £10,659 15*s.* 11*d.*, new 3 per cent. annuities, and that, subject to the life estate of the said Earl of Mountcashell in that sum, the defendant and the said Richard Charles More-Smyth were respectively entitled thereto as tenant for life, and tenant in tail in remainder respectively, subject to a mortgage thereon created by them in favour of John Jessop, to secure £5300 due from the defendant to him; and that with a view to discharge the several incumbrances affecting the life estate of the Earl of Mountcashell, the said mortgage in favour of the said John Jessop, and the other incumbrances affecting the said estates, the defendant and Richard Charles More-Smyth had entered into negotiations for the purchase of the life estate of the Earl of Mountcashell in the estates, and also in the said sum of £10,659 15*s.* 11*d.*, upon terms, one of which consisted in their paying to the Earl of Mountcashell for life an annuity of £300 out of the rents of the Mountcashell estates, and that in order to effect such purchase, and pay off the said incumbrances, the defendant, and the said Richard Charles More-Smyth, proposed, with the consent of the Court, to be obtained in the proceedings relative to the lunacy of Lord Mountcashell, to sell the said sum of £10,659 15*s.* 11*d.*, and apply the proceeds, so far as the same would extend, towards such

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purposes, and to raise the balance of the money required by mortgage of the Mountcashell estates from the National Bank; it was witnessed that in the event of the purchase of the life estate, and of the loan being made by the National Bank, the defendant should have the use of Moor Park House (the mansion-house upon the Mountcashell estates), and the demesne subject to the payment by him during the lifetime only of his wife, the Hon. Charlotte Mary More-Smyth, of an annual sum of £150, to be paid out of his moiety of the income to be derived by him from the Mountcashell estates, in lieu of rent, for the exclusive use, occupation, and enjoyment thereby agreed to be given to him of the mansion, subject to the payment, during the life of Lord Mountcashell, or until the said loan from the National Bank should be repaid, of £400 as rent for the demesne: after the purchase by the defendant and Richard Charles More-Smyth of the life estate, and completion of the loan, the rents during the life-time of the defendant should be applied first in paying an annuity of £300 to or for the benefit of Lord Mountcashell for life; secondly, in keeping down the interest on the said contemplated loan from the National Bank; and, subject thereto, "the residue of such rents and income . . . shall go and belong to, and be divided between the said Charles William More-Smyth and Richard Charles More-Smyth in equal shares and proportions." After the death of Charles W. More-Smyth, the whole of the rents and income were to go and belong to the said Richard Charles More-Smyth absolutely. It was further agreed that the net proceeds of all timber cut on the Mountcashell estates during the life of the defendant, should from time to time be applied in the first place in paying off and discharging the contemplated loan from the National Bank, and subject thereto, such net proceeds should from time to time, during the life of the said Charles W. More-Smyth, be set apart and invested in the joint names of himself and Richard Charles More-Smyth, until it accumulated to £10,659 15*s.* 11*d.*, and the income should during the life of Charles More-Smyth be divided equally between him and Richard Charles More-Smyth, and after the death of Charles all moneys invested, and the income thereof, should belong to the said Richard Charles More-Smyth absolutely.

Richard Charles More-Smyth died on the 3rd January, 1888, leaving his widow, the plaintiff Helen Stirling More-Smyth, and an infant son, Claude Stephen William Richard More-Smyth (but no other issue), who became tenant in tail in remainder of the estates.

Owing to the death of Richard Charles More-Smyth, the arrangement contemplated by the agreement of the 25th November, 1886, fell into abeyance, but by an agreement dated the 24th February, 1888, made between the defendant of the one part, and the plaintiff Mrs. More-Smyth of the other part, and supplemental to the hereinbefore stated agreement, after reciting that it was the intention of the defendant to apply to the Lord Chancellor to sanction the scheme for the purchase of Lord Mountcashell's life estate as embodied in the original agreement, with the variation that the balance of the moneys requisite for the purposes aforesaid should be raised by a mortgage of the Mountcashell estates by means of a term of 2000 years, created and then subsisting therein by virtue of an indenture dated the 4th May, 1876, and made between the Right Hon. Stephen (late Earl of Mountcashell), and the said Earl of Mountcashell, by the committee of his estate of the first part, the Hon. Lady Jane Moore of the second part, and Robert Honeybowine Ashton, and Edmund Hertslet of the third part; it was witnessed that the defendant covenanted with the plaintiff that if the scheme for the purchase of the life estate should be sanctioned, and if the balance of the moneys requisite for the purposes aforesaid, should be raised by means of the term of 2000 years, and applied in the manner and for the purposes contemplated, all the rights and interests to which, under or by virtue of the before-mentioned agreement, the said Richard Charles More-Smyth, if he were then living, and such agreement were then perfected, would then be entitled, should as between himself and the said Claude Stephen William Richard More-Smyth, belong and pass to the said Claude Stephen W. R. More-Smyth absolutely, with the variation that in lieu of £150 to be paid by the defendant for the use of the Moor Park House, the sum of £75 per annum should be paid by him therefor. The scheme mentioned in the last agreement was sanctioned by the Lord Chancellor in the lunacy matter, and by an order dated the 3rd

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March, 1888, and made by the Lord Chancellor in the said matter, it was ordered that Lady Jane Moore, as the committee of the estate of the said Earl of Mountcashell, should execute to the defendant and the plaintiff on behalf of the said Claude Stephen W. R. More-Smyth, a conveyance of the life estate of the Earl in the Mountcashell estates.

By indenture bearing date the 16th July, 1888, made between the Earl of Mountcashell (by Lady Jane Moore, the committee of his estate) of the first part, Francis Cadwallader Adams of the second part, and the defendant and the plaintiff of the third part the life estate of the said Earl of Mountcashell, in the Mountcashell estates was, pursuant to the said order, conveyed unto the defendant and the plaintiff, and their heirs, to the use that the Earl of Mountcashell should receive thereout during his life the yearly rentcharge of £300, and subject thereto to the use of the defendant and the plaintiff, their heirs and assigns, during the life of the said Earl of Mountcashell.

By indenture bearing date the 9th August, 1888, made between the defendant and plaintiff of the first part, the said Francis Cadwallader Adams of the second part, and the National Bank of the third part, the defendant and the plaintiff and Francis Cadwallader Adams demised to the bank the Mountcashell estates for ninety-nine years, if the Earl of Mountcashell and the defendant or the survivor of them should so long live, subject, however, to the contingency of the said Earl of Mountcashell leaving male issue, and subject also to redemption upon payment by the defendant, and the plaintiff, or either of them, of the sum of £6238 19*s.* 8*d.*, with interest at £4 per cent.

By an indenture dated the 16th August, 1888, made between the defendant and the plaintiff of the one part and the National Bank of the other part, it was agreed that the defendant should thenceforth, in the name of himself and the plaintiff, or otherwise, receive the rents and profits of the said Mountcashell estates, and should also receive the proceeds of the sale of so much of the timber and trees thereon as the defendant and the plaintiff were entitled to cut down, sell, and dispose of, and out of such rents, and profits, and proceeds of sale, pay all head-rents, rates, taxes, and also the yearly rentcharge of £300; and, after deducting his remuneration

as receiver, should pay the premiums on the several policies of insurance and the interest on the several charges set forth in the schedule, and retain the surplus for himself and the said Helen Stirling More-Smyth in equal shares.

By an indenture dated the 10th December, 1888, and made between the defendant of the first part, the plaintiff of the second part, and the defendant and plaintiff of the third part, the defendant, in consideration of the agreements before stated, conveyed his life estate in the Mountcashell estates to the use of himself and the plaintiff and their heirs, upon the trusts contained in the agreements of the 25th November, 1886, and the 24th February, 1888, or such of them as were capable of taking effect, and it was thereby declared that all the estates by the deed of the 16th July, 1888, and by the indenture now in statement conveyed to her, were so conveyed to her as trustee for Claude Stephen W. R. More-Smyth.

Stephen, Earl of Mountcashell, died a bachelor on the 9th November, 1889, and the defendant Charles William More-Smyth succeeded to the title and became tenant for life of the estates. The mortgages affecting the life estate of the late Earl had all been paid off, and also the mortgage created by the indenture of the 9th August, 1888.

The defendant entered into receipt of the rents and profits of the Mountcashell estates, and he had ever since been in receipt of the rents and profits, under the agreement of the 25th November, 1886. Claude Stephen William R. More-Smyth died on the 1st October, 1890, and letters of administration of his personal estate were on the 3rd December, 1890, granted to the plaintiff. Applications having been made to the defendant for an account of one moiety of the rents, and no account having been furnished, an action was brought against the defendant by the said Claude Stephen More-Smyth for an account in the Chancery Division in England. Claude Stephen died before the trial, and the action was continued by his mother, Mrs. Helen More-Smyth, as his administratrix. On the 5th November, 1891, judgment was pronounced in the action, and it was declared that the life estate of Stephen, Earl of Mountcashell, and also the life estate of the defendant, were bound by the agreements dated the 25th November, 1886, and 24th February, 1888, and the 10th December, 1888,

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and that an account of the rents should be taken. The defendant failed to account, and the plaintiff applied for an attachment, but the Court refused to issue the writ of attachment on the ground that the defendant as a peer was privileged therefrom. The plaintiff then enrolled the judgment pursuant to the statute 41 Geo. 3. c. 90, s. 5, and applied to the Master of the Rolls for an order that a writ of sequestration should issue against the defendant; but his Lordship declined to make the order, as not authorized by the statute (1). The present action was then brought by Mrs. More-Smyth against Charles William, Earl of Mountcashell, for an account of the rents and for payment to her of one moiety of the rents.

By the defence, the defendant pleaded that, on the death of the infant Claude Stephen More-Smyth, the defendant, as his heir-at-law, became beneficially entitled to the infant's moiety of the net rents and profits of the Mountcashell estates.

Twigg, Q.C., and *C. A. O'Connor*, for the plaintiff.

Serjeant Campion, Q.C.; *Serjeant Jellett, Q.C.*, and *F. Fleming*, for the defendant.

June 2.

THE MASTER OF THE ROLLS:—

In this case the plaintiff Mrs. Helen Stirling More-Smyth sues in respect of the rights of her late son Claude Stephen William Richard More-Smyth to a moiety of the rents and profits of the Mountcashell estates during the lifetime of the late and of the present Earl of Mountcashell. The facts of the case mainly depend on a number of documents, which are set out correctly in the statement of claim, with the exception of one inaccuracy, which is mentioned in the statement of defence; and I shall not take up time in referring to them at length. Shortly stated the facts are these:—

Stephen More, the late Earl of Mountcashell, was a lunatic, and his property was under the control of the Lord Chancellor of Ireland. He was tenant for life of the lands known as the Mountcashell estates, which were limited in strict settlement to the use of the late Earl during his life, with remainder to the use of his first and other sons, successively, according to seniority in tail male, with remainder to the use of his brother the defendant

(1) *Kilworth* v. *Mountcashell*, 31 L. R. Ir. 31.

(then Charles William More-Smyth), and his assigns, during his life, with remainder to the use of Richard Charles More-Smyth, the first son of the body of the defendant, in tail male, with divers remainders over. It appears that the settled property comprised not only lands, but also a sum of consols in Court. A proposal was made, subject to the approval of the Lord Chancellor, by which the life estate of the lunatic Earl was to be sold to pay incumbrances and provide an annuity of £300 for his maintenance during his life; the defendant and his son Richard Charles More-Smyth were to purchase the life estate, and divide the property during the life of the lunatic Earl and of the defendant, subject to payment of the said annuity and other charges. This was embodied in an agreement of the 25th November, 1886, by which, if it had been carried out, the defendant and his son would have been tenants in common of the estates during the life of the defendant. But before this agreement could be carried out the son died, without having disentailed the estates, and his infant son, Claude Stephen William Richard More-Smyth, became tenant in tail in remainder, and the agreement fell through, because the infant could not be bound by the agreement between his father and grandfather. Accordingly a second agreement was entered into on the 24th February, 1888, between the defendant and the plaintiff. By it the defendant covenanted with the plaintiff that if the scheme for the purchase of the life estate of the then Earl was sanctioned by the Lord Chancellor of Ireland all the rights and interests to which under the former agreement Richard Charles More-Smyth, if he were then living, would have been entitled, should as between himself and the infant belong and pass to the infant absolutely. The scheme contemplated by the latter agreement was sanctioned by the Lord Chancellor of Ireland in the lunacy matter, and by an order of the 3rd March, 1888, it was ordered that Lady Jane Moore, as the committee of the estate of the then Earl, should execute to the defendant and the plaintiff on behalf of her infant son a proper conveyance of the life estate of the said Earl in the Mountcashell estates. The scheme was carried out by several deeds of the 16th July, 9th August, 16th August, and 10th December, 1888, all of which the plaintiff representing her son entered into on his behalf. The last of these deeds contains the

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words upon which the question in the case mainly turns. By it the said defendant, as beneficial owner, conveyed to himself and the plaintiff all the lands therein mentioned, to hold the same unto and to the use of the defendant and the plaintiff and their heirs during the life of the defendant upon the trusts and by with under and subject to the powers, provisions, agreements, and declarations contained in the said agreements of the 25th November, 1886, and 24th February, 1888, or such and so many of the same as continued capable of taking effect; and it was thereby expressly declared by the plaintiff that all the estates and interests by the said deed of 16th July, 1888, and by those presents conveyed to her (and subject and as in manner therein respectively stated) were conveyed to the plaintiff as trustee for the said Claude Stephen William More-Smyth.

Therefore the plaintiff took the legal estate in the lands along with the defendant during the lifetime of the late Earl and of the defendant; but she took it as trustee for her son, and the effect was that as regards one undivided moiety she was owner *quasi* in fee in trust for her son. The peculiarity is that there are no words of limitation as to the equitable estate so created. The question is, What estate was conveyed by these words? The infant died on the 1st October, 1890, and the lunatic Earl predeceased him on the 9th November, 1889. Did the interest which Claude Stephen William More-Smyth took under the deed pass to his personal representative the plaintiff under sect. 6 of the Wills Act as being an estate *pur autre vie*, and there being no special occupant; or, did the interest pass to his heirs, and therefore to the defendant who is his heir-at-law?

An action was brought in the Chancery Division of the High Court of Justice in England in the name of the minor by the present plaintiff, as his next friend, for an account of the rents and profits of the estates received by the defendant pursuant to the said agreements. The minor died before the action was brought to trial, and the action was continued by the plaintiff as his administratrix. A decree was made on the 5th November, 1891, whereby it was declared that the life estates of the late and present Earl were included in and bound by the said agreements; and it was ordered that an account should be taken of the rents and

profits of the Mountcashell estates received by the defendant pursuant to the said agreements, and the defendant was ordered to pay the costs of the action.

The English decree became inoperative, as the defendant did not render accounts, and resided in Ireland. Accordingly a copy of the decree was exemplified and enrolled in this Court, pursuant to the statute 41 Geo. 3, c. 90, section 5, and an application was made to me to enforce it by way of sequestration against the defendant; but I was of opinion that the statute did not authorise the issue of a writ of sequestration, and I made no order on the application (1). Accordingly substantive proceedings in this country became necessary, and the present action was brought here, where in my opinion it ought originally to have been brought, instead of in England. Without saying that it was oppressive to bring the action in England, it would at least have been better to have brought it here. The English decree determined that the defendant was liable to account to the minor and his personal representative in respect at any rate of the rents and profits received by the defendant in the lifetime of the minor. That decree was relied on here as a flat bar to the maintenance of this action, the decree having been obtained against the defendant for the same cause of action as that for which this action if brought, and having been made a judgment of this Court by virtue of the statute 41 Geo. 3, c. 90. That contention was properly abandoned at the bar, and indeed it could not have been sustained as a defence to this action. In refraining from pressing this point, it was said by counsel for the defendant that the matter might be borne in mind by me in considering the question of costs, and I shall not forget it. The question, however that has been argued here was not raised in the English action, namely, what became of the rents and profits received by the defendant after the death of the minor?

It was strenuously argued that the section 6 of the Wills Act could not apply, because the legal estate is admittedly in the trustee, and that therefore, though there is no special occupant in respect of the equitable interest, yet the heir of the trustee will

(1) *Kilworth* v. *Mountcashell*, 31 L. R. Ir. 81.

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be a special occupant, and thus it cannot be said that there is no special occupant within the meaning of the section.

But in the first place there is now no special occupant at all, since the trustee who took the grant of the legal estate is living, and, secondly, *Reynolds* v. *Wright* (1), and other cases, show that in relation to cases of special occupancy in connection with section 6 the equitable interest is wholly apart from the legal estate, and is subject to the same rules, equity in this respect following the law. "Therefore," says the Lord Chancellor (at p. 593 of that case), "I cannot doubt that there may be a special occupant of an equitable estate *pur autre vie*, although the legal estate be in the trustee." All the cases proceed upon this principle, which is settled law; though no doubt it is hard to see how the doctrine of title by occupancy, general or special, came to be applied to cases where the legal estate is vested in a trustee.

The real question is, whether it was or was not the effect of the agreements and deeds in question to vest the entire equitable interest in Claude Stephen William More-Smyth for an estate in *quasi* fee? That the entire interest did vest in Claude Stephen William More-Smyth there can be no question, but whether, after his death, it passed to his heirs as equitable special occupants, or to his executors by force of the statute, is the point to be determined.

The plaintiff, in support of the latter view, says there are no words of limitation in the creation of the interest which Claude Stephen William More-Smyth took. True, the grant to his trustees was limited to their heirs, but that circumstance is immaterial, since the estate to be considered is not that of the trustees, but that of the *cestui que trust*. There would be nothing inconsistent in a grant to A and his heirs for the life of B, in trust for C, his executors, adminstrators, and assigns. Therefore, when the estate stands limited, as here, to A and his heirs for the life of B in trust for C, there is nothing in the terms of the grant to show which class of C's representatives, real or personal, is to succeed. The case is therefore within sect. 6, there being no special occupants, and *Philips* v. *Philips* (2) is in point.

For the defendant, it was argued that the limitation of the legal estate being in express words to the heirs, it must be assumed

(1) 2 De G. F. & J. 590. (2) 1 P. Wms. 33.

that the intention was that the equitable interest should be exactly similar, unless some indication of a different character is to be discovered in the documents, which is not the case. And, indeed, it would seem to be a whimsical way of dealing with the family estates if the result should be that the executors of Claude should hold the moiety during the lifetime of the defendant, his grandfather, and that then the heirs of his grandfather who would also, probably, be the heirs of Claude, should step in for both moieties. That, however is not the question, and there can usually be no worse mode of construing written documents than by results.

It is to be observed that the declaration of trust by the plaintiff is, of "all the estates and interests" conveyed to her by the deeds of the 16th July, 1888, and the 10th December, 1888. Now, what is the meaning of that form of expression? I think it means that whatever her legal estate may be, of that same estate she is trustee for Claude, and that as she had a descendible freehold, being an estate *quasi* in fee, the estate of Claude was also an estate *quasi* in fee, and goes to his heir.

If it were the case of a will there could be no doubt of this. In *Wall* v. *Byrne* (1) the matter arose thus: Luke Wall, being entitled to the lessee's interest in lands held under a lease for lives renewable for ever, obtained a renewal thereof, and thereby the lands were demised to him, his heirs and assigns, for the term of three lives therein named, with a covenant for perpetual renewal. Luke Wall afterwards made his will, containing the following devise, which included in it his interest in the lease:—"And as for and concerning all my real freehold and personal property of which I am now possessed or entitled to, I give, devise, and bequeath the same and every part thereof unto my dear wife and my children Margaret, Anne, Ellen, Mary, Joseph, Luke, Christopher, and Valentine, share and share alike," and died shortly afterwards. Mary Wall and Christopher Wall, having survived the testator, died intestate and unmarried. In a suit to administer the assets of Luke Wall, the Master reported that the shares of Mary Wall and Christopher Wall were vested in Joseph Wall, their eldest brother and heir-at-law. Exception was taken, on the ground that the shares of Mary Wall

(1) 2 J. & L. 118.

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and Christopher Wall vested in their personal representatives. Counsel, in support of the exception, cited *Doe* d. *Lewis* v. *Lewis* (1), and were proceeding to argue the case, when they were stopped by the Lord Chancellor (Sir Edward Sugden), who said:—"I cannot permit this exception to be argued. If ever a point was closed by decision it is this: that where a man has an estate *pur autre vie*, limited to him and his heirs, and devises that estate, by words which, without words of limitation, would pass the *quasi* inheritance—as the words here would—and the devisee dies intestate, the persons to take are the heirs and not the personal representatives of the devisee. The point was so decided in this country many years since (2), and that decision has been followed in England, and many opinions have been given on it. I must therefore decline to hear the question argued, for I will not be auxiliary to unsettle settled opinions. The case of *Doe* d. *Lewis* v. *Lewis* (1) is distinguishable. There the devise was to a man and *his assigns*, which, it was held, did not mean *heirs*; but in this case the devise is in general terms, and in words which are sufficient to pass the entire interest under the lease. If this had been a fee-simple estate it would have gone to the devisee and his heirs under the terms of this devise. The testator gives all his interest in the lands to his devisees, and both law and good sense require that they should take the same interest which he himself had It is a settled point, and not now open to be disturbed."

The question came before the Court in *M'Clintock* v. *Irvine* (3), and if the marginal note of that case were correct it would be decisive on the question. The marginal note is as follows:—"Lands held for lives renewable for ever were conveyed for all the estate of the tenant to trustees, their heirs and assigns, for the lives in the lease; and the deed contained a declaration that the names of the trustees were made use of as trustees for J. W. B., and that the grants therein contained were for his sole use and benefit and for no other use, intent, or purpose:—*Held*, that J. W. B., took the entire equitable interest in *quasi* fee." But in the judgment I do not find any actual decision as to the quality of the estate which James Watson Boyes took in the lands, though the case does decide that he took the entire interest

(1) 9 M. & W. 662. (2) See *Blake* v. *Jones* d. *Blake*, 1 H. & B. 227 n.
(3) 10 Ir. Ch. Rep. 480.

pur autre vie. The petitioner claimed under a marriage settlement, whereby he had vested the entire land in trustees; and no doubt he could have done this, whether his own interest was such as would have passed if undisposed of to his heirs, or to his personal representatives. Lord Chancellor Brady gives an exhaustive and entertaining discussion on the subject of estates *pur autre vie*, and after referring to *Barron* v. *Barron* (1), and the other cases cited, says:—"In this case, however, everything concurs to show the intention that the entire interest should pass; and therefore I do not think it necessary to do more than shortly allude to *Barron* v. *Barron* (1), which does not, as I think, prevent my deciding the question here, according to the old common law doctrine. On the face of the instrument there is a plain declaration that the names of the trustees are used merely for James Watson Boyes; and I am of opinion that he is entitled to the whole estate of the grantors; that the words used are quite large enough; that it is not necessary to have words of inheritance, if by other words the intention to pass the whole estate of the grantor be indicated. In this case we have such indication of intention, and I therefore think the petitioner entitled to a decree, and with costs."

The Lord Chancellor does say that it is not necessary to have words of inheritance in order to pass the whole estate, which would seem to imply that he thought that James Watson Boyes took the entire equitable interest in *quasi* fee, and to that extent the wording of the marginal note would seem to be justified.

But the case does decide, practically overruling *Barron* v. *Barron* (1), that words of inheritance are not necessary even in a deed in order to pass an estate *pur autre vie*, if the intention to pass the whole estate is discoverable. And in *Brenan* v. *Boyne* (2), Lord Chancellor Brady repeated and expanded his judgment in *M'Clintock* v. *Irvine* (3). He thought that the Master of the Rolls had disregarded *M'Clintock* v. *Irvine* (3). At p. 102 of the report he says:—"The case of *M'Clintock* v. *Irvine* (3), was decided on these grounds: that it is not necessary to have words of inheritance, if by other words the intention to pass the whole estate of the grantee be used, or plainly indicated, in the words of conveyance or declaration of trust—by which I mean, words in themselves

(1) 8 Ir. Ch. Rep. 366. (2) 16 Ir. Ch. Rep. 87. (3) 10 Ir. Ch. Rep. 480.

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sufficient in expression to comprise that entire interest; and in this class I include the words 'all the estate' of the grantor, or generally 'his estate' in the lands." (In the present case Mrs. More-Smyth declared a trust in favour of her child.) Again, at p. 105, he says:—

"What are the 'estate and property' here referred to? Plainly all the estate in the lands of Dereen under the lease of 1810. The question to be considered is simply what did the settlor part with? When that is decided, then all is at end." And Lord Justice Blackburne undoubtedly thought that the interest which passed was not only the whole interest, but that it went as an estate *quasi* in fee. At p. 109 he says:—"It further appears to me that the construction which would give estates *quasi* in fee to the children of Catherine is supported and made reasonable by adverting to the limitations over; the first is to James Brenan for life, in case Catherine did not leave issue living at her death, with remainder to Ellen in *quasi* fee; and on the death of Ellen, without issue living at her death, to the right heirs of Patrick Wyer. If it were intended that Catherine's children should only have estates for life, why not limit the estates over in the ordinary way on their death, or why make them dependent on the contingency of their happening to die in the lifetime of their mother, Catherine? On the other hand, if we hold that the children of Catherine took the whole estate *quasi* in fee, we find that the defeasance of their estates is effected in the same manner and in the same language that are subsequently adopted in the defeasance of the estate *quasi* in fee limited to Ellen. These considerations appear to me to suggest the conclusion that the estates defeasanced were in both cases the same; that is, absolute estates."

It may have been that it was not necessary to decide the point, as was the case in *M'Clintock* v. *Irvine* (1), but I have no doubt that that was the opinion of Lord Chancellor Brady, and that the Court of Appeal held that the words in a deed might pass the estate of inheritance without words of limitation. It appears that Master FitzGibbon decided the same point on the same day in *Batty* v. *Elliott* (2), and that he was immediately afterwards

(1) 10 Ir. Ch. Rep. 480. (2) 16 Ir. Ch. Rep. 110 n.

informed by counsel of the decision of the Court of Appeal in *Brenan* v. *Boyne* (1).

Croker v. *Brady* (2) was a case to some extent the converse of the present. There the estate of the trustees was limited to them, their executors, administrators, and assigns, and there were no words of limitation attached to the interest of the beneficiaries, who were held to take the property as personalty. The reasoning of the judgment of Sullivan, M.R., in the Court of Appeal is entirely in favour of the defendant here. At p. 658 he says:—"Now here the persons to whom the estate is so limited, as I have above mentioned, are to hold it, in the events which have happened, for the issue of the marriage, there being no words attached to the limitation to the issue indicating whether the heirs of such issue, or their personal representatives, are to take on their deaths without having disposed of their estate. If the legal estate in the interest *pur autre vie* remained in the trustees, they hold to them, and the survivor of them, and the executors of the survivor absolutely in trust, say, for simplicity sake, for A. There may be a special occupant of an equitable estate as of a legal estate in an interest *pur autre vie;* and such special occupant is to be determined precisely in the same manner as that of the special occupant of a legal estate in such an interest." He then refers to *Reynolds* v. *Wright* (3), to which I shall presently refer, and continues:—"It appears to us that under the limitation I have stated of the interest *pur autre vie*, namely, an assurance to trustees and the survivor of them, his executors, administrators, and assigns, to hold the legal estate, but in trust for A, A has either the equitable estate, in him and his executors, corresponding to the limitations of the legal estate out of which he derives his equitable estate, or he has the estate in him without any special occupant named; in which case the words of the statute, 7 Wm. 4 and 1 Vict. c. 26, s. 6, are precisely applicable, enacting as they do that 'in case there shall be no special occupant of an estate *pur autre vie* it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant.'"

In *Doe* d. *Lewis* v. *Lewis* (4) the devise, in a will under

(1) 16 Ir. Ch. Rep. 114.
(2) 4 L. R. Ir. 653.
(3) 2 De G. F. & J. 590.
(4) 9 M. & W. 662.

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the old law, was "to W. J. Lewis and his assigns during the residue of the lease, subject to payment of the rent and performance of the covenants." W. J. Lewis died intestate and without assigning, and his heir-at-law entered. His administratrix brought ejectment, and the Court of Exchequer decided in her favour. There were no words giving W. J. Lewis all the estate. It was as if the lands were devised to W. J. Lewis *simpliciter* during the lease, *i.e. pur autre vie.* Whether the reasoning in that case is applicable at present or not, it does not apply to a case where the estate, the subject of the trust, is the estate and interest of one who holds in *quasi* fee.

Parke, B., there says:—"It has been said that much doubt exists in the profession as to the question which has been raised in this case; but I do not see why such doubt should have existed. Originally there was a special occupant designated in the lease to William Lewis the grandfather, his heir and assigns, but when the grandfather devised the premises to W. J. Lewis, the son, and his assigns, he thereby defeated the title of his heirs as special occupants and the devisee continued to hold the property to himself and his assigns for the residue of the term. The utmost that could be said is, that if W. J. Lewis the son had made an assignment of the lease, perhaps his assignee would be entitled to hold the estate as special occupant; but where, as is the case here, he makes no assignment at all, it falls within the express words of the Statute of Frauds, 29 Car. 2, c. 3, s. 12, which provides that, in case there shall be no special occupant of an estate held *pur autre vie*, it shall go to the executors or administrators of the party that had the estate thereof. Now here there is no special occupant, the title of the first lessee having been put an end to by the will; the land has been held under a tenancy *pur autre vie* to W. J. Lewis the son, and his assigns; and as he died without creating any assigns the property goes to his personal representative. It is said, however, that though there was here no express assignment by W. J. Lewis the son, the property may go to his heir, as being the assign in law; but it must be remembered that this is a devise under the statute 29 Car. 2, c. 3, not under the Statute of Wills, relating to an estate in fee-simple; and I do not think

that "assigns" can be considered as comprised under the words "heirs, executors, or administrators" used in that statute. The word "assign" does not mean "heir"; it means a person substituted for another by an act of some kind or other; and as the devisee has not done any act to appoint any assign the property must go to his administratrix."

Reynolds v. *Wright* (1) is a case which must be carefully considered to be fully understood. Elizabeth Shepherd, the testatrix, by her will disposed of real freehold and copyhold estates for lives and years. She was possessed of a leasehold estate for three lives, demised to her, her heirs and assigns. The will devised and appointed all the real estate, whether freehold, copyhold, leasehold, for lives or years, or of whatever tenure the same might be, which she was seized or possessed of or entitled to, unto and to the use of trustees (whom she also appointed her executors), their heirs, sequels in right, executors, administrators, and assigns for ever according to the different tenures or natures thereof respectively, in trust for John Samuel Barron, his heirs and sequels in right, executors, administrators, and assigns for ever. If all those words of limitation were intended to apply to the leasehold in question, the devisee being illegitimate and having died unmarried, it would seem to follow that, failing heirs and assigns, the executors would take as special occupants. But the Master of the Rolls, whose decree was appealed from, held that this was not so. In his judgment, reported in 25 Beavan, at p. 102, he says:—"It is suggested on the part of the legal personal representative of Barron, that as the subjects of devise are freeholds, copyholds, leaseholds for lives and years, and the words of limitation are heirs, sequels in right, executors, administrators, and assigns, by referring each word of limitation and succession to the various subject-matters given, the word 'heirs' applies to freeholds, 'sequels in right' to copyholds, 'executors, and administrators' to leases for lives and years; but I am of opinion that this would be an improper and forced construction, and that the proper mode of construing all such words of limitation is to refer them, as they properly ought to be, to the various subjects of the gift;

(1) 2 De G. F. & J. 590.

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thus that if the testatrix's property consisted of leaseholds for lives, demised to her and her heirs, and of other leaseholds for lives demised to her and her executors, the word 'heirs' would apply to the former, and the word 'executors' to the latter class of leaseholds. And it cannot be that all the persons so specified in the limitation are to be treated as special occupants pointed out by the testatrix, to be substituted one after the other, in case of failure of the first, second, and so on, in succession. In fact, the words 'according to the different tenures and nature thereof,' as was properly observed in argument, displaces the point thus raised. But without it, I should be of opinion that the same construction ought to prevail on this will, and that the same conclusion would follow, and that the words are properly referable to that to which they properly refer." And the Lord Chancellor, in affirming his decision, seems to have adopted the same view. It was, therefore, the case of a devise of an estate *pur autre vie* to a man and his heirs, the man having no heirs, and being incapable without marriage of having heirs. Thus there was and could be no special occupant, and section 6 of the Wills Act applied.

In *Philips* v. *Philips* (1) the question was not as between the real and personal representatives of Martha Philips, but as between her personal representatives, and the heir-at-law of her father, the testator. There was much divergence of opinion as to the rights under the will. The reporter reports his own argument at length, but at page 40, he says:—"Note the variety of opinions in this case; for Elizabeth Philips, the mother, bringing a bill for an account of the profits of her daughter's moiety since her death, and the cause being heard before the Master of the Rolls, he held that Elizabeth and Martha were joint tenants, and that all survived to Elizabeth. Upon an appeal to Lord Somers, then Lord Chancellor, his lordship held that Elizabeth and Martha were tenants in common, and that Martha's estate determining by her death, the remainder-man or reversioner had a right to that moiety. Afterwards Lord Keeper Wright, upon a rehearing, was of opinion that an estate by implication did arise to Elizabeth in Martha's moiety after the

(1) 1 P. W. 34.

death of Martha. But, upon his referring it to the Court of Common Pleas for their opinion, they conceived that Elizabeth and Martha were tenants in common, and that Martha had an estate *pur autre vie*, which, upon the Statute of Frauds (that takes away occupancy), ought to go to Martha's administratrix (*scil.*) Elizabeth the mother, and that Martha had not an estate tail in the trust, for that mergers are odious in equity, and never allowed except for special reasons."

The limitation to the trustees was to them and their heirs in fee, and it does seem that they took the legal estate during the joint lives of the daughter and widow of the testator. The decision was that the widow, as administratrix of her daughter, was entitled under the Statute of Frauds during her own life to the moiety which had been the daughter's. But there were no general words whatever, no "all the estate" clause, nothing but a gift of a moiety of the lands to the daughter during the lifetime of the mother. There was no circumstance to show a design that the heirs of the daughter should take, for though the trustees took the fee in terms (whether the remainder in tail after the life estates was or was not created in the *cestui que trust* by the Statute of Uses), they took it for the purpose of the whole settlement, and not of the daughter's life estate alone. I think on this ground the case is substantially distinguishable from that before me. If it were not I should still follow the more recent authorities. I am of opinion, therefore, that the contention of the defendant is correct, and that the defendant, upon the death of the infant, Claude Stephen William Richard More-Smyth became entitled, as his heir-at-law, to the infant's moiety of the rents and profits of the Mountcashell estates.

The plaintiff appealed (1).

Twigg, *Q.C.*, and *O'Connor*, for the appellant :—

In the original agreement of the 25th November, 1886, there

(1) In the Court of Appeal, before WALKER, C., PALLES, C.B., and FITZGIBBON, L.J.

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is no special occupant, and the second agreement merely put Claude in the place of Richard. By sect. 6 of the Wills Act it is equitable property that is to be distributed as assets of the testator. The older statutes are to the same effect, *e.g.* sect. 12 of the Statute of Frauds, the corresponding Irish statute being 7 Geo. 3, c. 12, s. 9. The declaration in the deed of 1888, that Mrs. More-Smyth and Charles W. More-Smyth were trustees of the legal estate for Charles and Claude does not alter it, because Mrs. More-Smyth was not an equitable owner, and therefore she could not alter the property of the minor. You cannot create an estate without words of special occupancy: *Philips* v. *Philips* (1); *M'Dermott* v. *Balfe* (2); *Cornwall* v. *Saurin* (3); *Reynolds* v. *Wright* (4); *Wall* v. *Byrne* (5); *Lewis* v. *Lewis* (6); *M'Clintock* v. *Irvine* (7); *Brenan* v. *Boyne* (8).

Mrs. More-Smyth had not the power of altering the devolution of the property. Being a mere trustee for the minor she could not change the character of the property.

Serjeant Campion, Q.C., *Serjeant Jellett, Q.C.*, and *Frederick Fleming*, for Lord Mountcashell:—

On the death of the minor the defendant became entitled in *quasi* fee: *M'Clintock* v. *Irvine* (7).

In order to avoid general occupancy you may limit the estate in the first instance to A B and his heirs, or else you can by a subsequent instrument change it: Co. Lit. 41 B. If an estate be limited to a man and his heirs, and he by will devises that in general words it will carry the full estate. By the agreement of the 26th November, 1886, clause 3, the balance of the rents were to be divided between Charles William and Richard Charles equally. It was never necessary to insert words of limitation in an executory agreement, but there is a covenant that each of them should execute such deed as might be necessary. The agreement of the 24th February, 1888, is supplemental to the deed of the 25th November, 1886. Then the deed of the 10th December, 1888, follows the terms of the executory agreements. In every instrument the

(1) 2 Vern. 430; 1 P. Wms. 34.
(2) Ir. R. 2 Eq. 440.
(3) 17 L. R. Ir. 595.
(4) 2 De G. F. & J. 590.
(5) 2 J. & Lat. 118.
(6) 9 M. & W. 662.
(7) 10 Ir. Ch. Rep. 480.
(8) 16 Ir. Ch. Rep. 87.

intention is shown to transmit the estate to the heirs as special occupants. In all the cases from *Blake* v. *Blake* (1) to *Wall* v. *Byrne* (2), if the estate is limited in the first instance to a man and his heirs, and then is devised by words which carry the whole interest, it goes to the same person to whom it was limited. There cannot be a special occupant of a covenant for perpetual renewal: *Philpotts* v. *Philpotts* (3).

In *M'Dermott* v. *Balfe* (4) the Vice-Chancellor was dealing with an executory contract which was never carried out; no life was nominated. In *Reynolds* v. *Wright* (5) the controversy arose between the trustees who claimed the estate and the Treasury as representing an illegitimate person, and if the case had been what Lord Campbell described it, namely a limitation to A B, his heirs and assigns, and A B was illegitimate, then the trustees took absolutely. *Atkinson* v. *Baker* (6) decided that if there is a limitation to a man, his heirs, executors, administrators, and assigns, then they take in that order. *Philips* v. *Philips* (7) is scarcely an authority, as the effect of the four different decisions in the case are conflicting.

WALKER, C.:—

June 27.

In this case it appears that Claude Stephen William Richard More-Smyth died on the 1st October, 1890, and at that time he was entitled to a moiety of the Mountcashell estates under certain instruments, which I shall state. The plaintiff is his personal representative, and claims this interest as personal estate. The defendant is his heir-at-law, and claims it as realty. The Master of the Rolls by his judgment, dated the 2nd June, 1893, declared that on the death of Claude Stephen More-Smyth the moiety of the estates to which he became entitled by virtue of the agreement mentioned of the 2nd February, 1888, devolved upon the defendant as heir-at-law, and the plaintiff has appealed.

(1) 1 Hud. & Bro. 227.
(2) 2 J. & Lat. 118.
(3) 3 Doug. 425.
(4) Ir. R. 2 Eq. 440
(5) 2 De G. F. & J, 590.
(6) 4 T. R. 229.
(7) 1 Vern. 430; 1 P. Wms. 34.

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The nature and descendible character of the estate, the devolution of which is contested, is the question which we have to decide. It will be necessary to give a short summary of the title to the estates.

In 1846, Stephen, Earl of Mountcashell, and his son Stephen, who afterwards became a lunatic, had complete powers of disposition over the Mountcashell estates, and by a deed of re-settlement, dated the 7th October, 1846, they conveyed the estates to such uses as they should appoint, and subject thereto, and the trusts of a certain term of 1000 years, to the use of Stephen, the Earl, for life, with remainder to Stephen the second for life, with remainder to his first and other sons in tail male, with remainder to the defendant in this action (the second son of the Earl) for life, with remainder to his first and other sons in tail male, with remainders over.

Stephen, the son of the Earl, became a lunatic, and all expectation of his having a son failed. The defendant had a son, Richard Charles More-Smyth, who became expectant tenant in tail. The life estate of the lunatic stood in succession between the Earl and the defendant. There was also a money fund of £10,659 15*s.* 11*d.*, representing land held on the same trusts as the estates.

By a deed, dated the 4th May, 1876, to which the Earl and the lunatic Stephen (Lord Kilworth), by his committee, were parties, the lands and money fund were appointed under the joint power contained in the deed of the 7th October, 1846, to trustees for a term of 2000 years from the death of the Earl, upon trust to raise a sum not exceeding £25,000 upon such trusts as the Lord Chancellor should direct for the maintenance and debts of Stephen (Lord Kilworth).

It appears that in 1886 the defendant and his son Richard entered into arrangements for the payment of the lunatic's maintenance and his debts, which included the acquisition of the life estate of the lunatic Earl who had in the meantime succeeded to the title and life estate, and this proposal was to be carried out by an agreement, dated the 25th November, 1886. [His Lordship stated the terms of the agreement at length, *ante*, pp. 45, 46.] In result the income of the Earl's life interest and the defendant's

life interest were to be held in trust for the defendant and Richard in equal shares, and after the death of the defendant in trust for Richard absolutely.

Now stopping there, and suppose that Richard had done no further act, I apprehend it is clear that if Richard died his personal representative would have been entitled. No special occupant is named; no antecedent estate existed of any particular quality, the transfer of which can be inferred to have been intended, and there was therefore a vacancy of occupancy which the statute supplied. The case differs from most in this, that what we have to deal with is the assignment of life estates, and not the creation of an estate *pur autre vie*. On the 18th December, 1886, an order in the lunacy matter was made by the Lord Chancellor. That order was:—"Proposal for purchase accepted with modifications; the purchase-money should be £18,035, and Lady Jane Moore, as committee, to execute a proper conveyance to Charles William More-Smyth and Richard Charles More-Smyth of the life estate of the Earl in the land and funds, subject to incumbrances, and to £300 per annum. Liberty was given to apply for payment out of the 'fund' of the mortgage of the 20th August, 1884. Under the power in the deed of the 4th May, 1876, a sum equal to the balance of the 'fund' be raised under the trusts of the term of 2000 years for payment of the incumbrances affecting the lunatic's life estate, to be raised by a sale of the stock. The Lord Chancellor, as protector, consents to a disposition," and proper deeds for barring the entail were to be settled, further annuity of £300 to be given subject to the mortgage to the National Bank, and the several deeds were to be lodged for approval on behalf of the Lord Chancellor.

Before the agreement of 1886 was carried out Richard died on the 3rd January, 1888, leaving the plaintiff his widow, and an infant son, Claude Stephen W. R. More-Smyth. There had been no disentailing of the lands. It became impossible to carry out the agreement of the 25th November, 1886, so far as providing funds for the purchase of the Earl's life estate, and payment of the debts. It became necessary to enter into a new agreement. [His Lordship stated the agreement of the 24th February, 1888, *ante* p. 47.] By an order in the lunacy matter, dated the 3rd March,

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1888, £11,000 was to be raised under the term of 2000 years in the deed of the 4th May, 1876, for payment to the National Bank, and it was referred to the registrar to settle and approve of a proper deed of mortgage to the Bank, and such other deed or deeds as should be necessary to secure the sums to be provided for the maintenance of the lunatic, as directed by the order of the 18th December, 1886; Lady Jane Moore, as committee of the lunatic, to execute to Charles William More-Smyth and Helen S. More-Smyth, on behalf of Claude, the conveyances directed by the order of the 18th December, 1886, to be made to Charles and Richard. The deeds accordingly were prepared and executed. [His Lordship stated the deeds of 16th July, 1888, and 10th December, 1888, *ante*, pp. 48, 49.]

The lunatic earl died a bachelor on the 9th November, 1889, and thereupon the defendant became Earl of Mountcashell, and, subject to the operation of the agreements and deeds, tenant for life of the Mountcashell estates. Claude died on the 1st October, 1890, and the right to the moiety of the rents, which have accrued since his death, and shall accrue during the life of the defendant, is the question in dispute in the action.

The judgment of the Master of the Rolls contains a statement of the law applicable to estates *pur autre vie*, and a full summary of the authorities bearing on the subject. An assignment of these life estates to the grantee and his heirs of course would make the heir the special occupant, and so the assignment to the grantee and his executors would make the executor special occupant, and if the assignment was to the grantee simply the estate *pur autre vie* would, in the words of the Wills Act, "go to the executor or administrator of the party that had the estate by virtue of the grant, and shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

The same consequences would follow in each case if the assignment rested only in agreement; and, upon the agreements of the 25th November, 1886, and the 24th February, 1888, I think it is clear that on the death of Richard, in the one case, or Claude in the other, without the character of the estate being altered, the equitable estate would have gone under the Wills Act as personal estate:

M'Dermott v. *Balfe* (1). But then the owner of an estate *pur autre vie*, having dominion over it, may alter its character, and by the form of his grant or devise change its transmissible quality, and this Richard could do ; and I think it may be taken that if Richard More-Smyth conveyed his equitable estate to A and his heirs in trust for B, B would take an estate *pur autre vie*, descendible to his heirs, and if he conveyed it to A and his executors, in trust for B, B would take an estate *pur autre vie*, which the executor would acquire ; and if the deeds of 16th July and 10th December, 1888. could be treated as a disposition by the owner of an estate *pur autre vie*, having dominion over it, to trustees and their heirs in trust for Claude, I think the reasoning of the Master of the Rolls and the authorities he has referred to would support his judgment.

I am further inclined to the opinion, as the agreements of the 25th November, 1886, and 24th February, 1888, are as I read them executory instruments, contemplating future deeds, that as no occupants are named in the agreements for Claude's estate, if the deed were in the form of a conveyance to trustees, their heirs and assigns, in trust for Claude and his heirs, Claude's heir would be entitled, notwithstanding his infancy. These assumptions involve the difficulty of altering the character of the infant's estate as it stood under the agreements, and altering it by the act of persons who had ceased to have dominion over it. It is not necessary to express any definite opinion upon this point, which is a very difficult one, but the inclination of my opinion is what I have stated, having regard to the effect of the Statute of Frauds and Statute of Wills upon the transmission of an estate of which there is no occupant, as explained in *Watkins* v. *Lea* (2) and *Ripley* v. *Waterworth* (3), and the fact that the agreements are executory.

It is another and much more difficult question whether the same consequence could follow if the deed were simply (what it is not) a mere conveyance of the estates to trustees and their heirs in trust for Claude *simpliciter*, without expressed words of limitation. It would be difficult to gather from this an intention to alter the transmissible character of the estate. But the deeds are not in such a form. Starting with the assumption that Claude, under

(1) I. R. 2 Eq. 440. (2) 6 Ves. 642. (3) 7 Ves. 437.

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the agreements took an estate transmissible by force of the statute to his personal representative, I can find nothing in the deeds to alter that unexpressed descendible quality, but on the contrary an expressed intention to preserve it. The *habendum* in the deed of the 10th December, 1888, is "To hold the same unto and to the use of the said Charles William More-Smyth and Helen Stirling More-Smyth and their heirs, and during the life of the said Charles William More-Smyth, upon the trusts and by with under and subject to the powers, provisoes, agreements, and declarations contained in the said agreements of the 25th November, 1886, and the 24th February, 1888, or such and so many of the same as are now capable of taking effect." All the rules relating to special occupancy apply equally to equitable estates: *Reynolds* v. *Wright* (1).

I am not insensible to the difficulties created by the case of *Philips* v. *Philips* (2), in the way of the conclusion arrived at by the Master of the Rolls, even construing the deeds from his standpoint: but I do not think it necessary to go into that question.

Upon the whole, and after much consideration, I have arrived at the conclusion that the claim of the plaintiff to treat the moiety of the estate as personal estate of Claude has been established, and therefore that the order of the Master of the Rolls should be discharged, so far as it contains a contrary declaration. The plaintiff will have her costs of the appeal.

PALLES, C.B.:—

The question to be determined is whether the equitable estate of the infant, Claude Stephen William Richard More-Smyth, the grandson of the present Earl of Mountcashell, in the moiety of the Mountcashell estates, to which his father would have been entitled under the agreement of the 25th November, 1886, had the same been carried into effect, passed, upon the death of the infant, to his heir-at-law, as special occupant, or to his administrator, under 7 Wm. 4 and 1 Vict. c. 26, s. 6. The mode in which the case of the respondent has been argued renders it convenient to consider separately two questions:—(*a*) What was the descendible character of the estate, when it was created by the

(1) 2 De G. F. & J. 590. (2) 2 Vern. 430; 1 P. Wms. 34.

agreement of the 24th February, 1888? and (*b*) Was that character altered by the execution of the deed of the 10th December, 1888?

The agreement of the 24th February, 1888, is admitted to have been for value, and capable of being enforced by specific performance. The material provision in it is that, in the events which have happened, "all the rights and interests to which, under or by virtue of the principal agreement, Richard Charles More-Smyth, if he were now living, and said principal agreement were now perfected, would be entitled, shall, as between himself and . . . Claude Stephen William Richard More-Smyth, belong and pass to . . . Claude Stephen William Richard More-Smyth absolutely," subject to certain terms not necessary to be stated here.

The provisions as to the lands contained in the agreement thus referred to as the principal one, *i. e.* that of the 25th November, 1886, to the benefit of which the infant thus became entitled, is that in the events therein mentioned, "the annual rents and income derived from the said estate . . . during the life time of . . . Charles William More-Smith," after certain specified payments thereout, "shall go and belong and be divided between . . . Charles William More-Smyth and Richard Charles More-Smyth, in equal shares and proportions."

The equitable estate *pur autre vie*, the subject of the present litigation, was created by this latter agreement. Previously to its execution no such estate was in existence. The estate previously subsisting was in Charles William More-Smyth himself, and was one for his own life. I mention this to emphasize the fact, which I deem to be the first material one in the case, viz. that the instrument creating the estate *pur autre vie* does not designate a special occupant. That circumstance differentiates the question for decision from that which it would have been had the estate agreed to be granted by Charles William More-Smyth been, not one for his own life, as it was, but one for the life of another person, which had been previously limited to him (Charles) and his heirs, as special occupants. The subject-matter of the agreements is not an estate *pur autre vie* which had been previously limited to the heirs of the grantee. The second material fact is that neither in the agreement of 1886, nor in that of 1888, is there any indication of intention that upon the death of the owner his

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heir should take as special occupant. From these two facts, coupled with the admitted law that an equitable estate *pur autre vie* is within sect. 6 of the Wills Act (*Reynolds* v. *Wright* (1)), it seems to me to follow that had the question depended upon the agreements alone, and if the conveyance of the 10th December, 1888, had not been executed, the case would plainly have been governed by the provision in that section, that "in case there shall be no special occupant of any estate *pur autre vie* . . . it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant." Indeed, the case would, in that event, be ruled by *M'Dermott* v. *Balfe* (2), because, although the statute actually operative in that case was the Landlord and Tenant Act of 1860, sect. 7, its material words are undistinguishable from those which I have quoted from the Wills Act.

This brings me to the second branch of the question, viz. the effect of the conveyance of the 10th December, 1888. The opinion of the Master of the Rolls is that the effect of that deed was to convey the moiety of the life estate to Lord Mountcashell and Mrs. Helen Stirling More-Smyth, their heirs and assigns, upon trust for the infant *simpliciter* that, under such a limitation, the descendible quality of the equitable interest of the infant followed that of the legal estate, and that such equitable estate, on the infant's death under age, passed to his heir-at-law and not to his personal representative. I do not think it necessary to determine whether such a result would have ensued had the grantor in the deed of the 10th December, 1888, absolute dominion over the estate, and had the trust declared by the deed been for the infant *simpliciter*. I offer no opinion upon that question, as it does not arise here; and I assume, for argument sake, the opinion of the Master of the Rolls upon it to be correct, although it seems to me difficult to reconcile it with *Philips* v. *Philips* (3). I conceive, however, that principle to be inapplicable to the present case, for two reasons: (*a*), because, at the time of the execution of the deed, the estate was bound by the previous agreement of the 24th February, 1888, and consequently, neither Lord Mountcashell, nor any other

(1) 2 De G. F. & J. 590. (2) I. R. 2 Eq. 440. (3) 1 P. Wms. 34.

person who was a party to the deed, had dominion over the estate, or was capable, by his own mere act, of altering the quality which the statute had attached to it; (*b*) because the trust declared by the deed of the 10th December, 1888, cannot be held to be a trust created *de novo* for the infant *simpliciter*, but must be ascertained by reference to the trusts as they existed immediately before the execution of the deed, and without regard to the limitation of the estate to the trustees, their heirs and assigns.

As to the first of these questions, it seems to me that the principle which prevents the nature of an infant's estate being altered from realty to personalty, or *vice versa*, by the act of a trustee, not directed by the Court of Chancery, nor specially authorised by the trust, applies to an alteration of the transmissible quality of the estate *pur autre vie* of an infant. I admit that if the act which effects the conversion or alteration is authorised by the trust, or is directed by the Court, there is no equity between the real and personal representatives. To use the well-known words of Lord Loughborough in *Oxenden* v. *Lord Compton* (1), each must take "what they find . . . in the condition in which they find it." Thus, in *Pierson* v. *Shore* (2), one who had a bishop's lease to her and her heirs, during three lives, devised the same to her daughter, an infant, and directed that the guardian should make purchases for the infant's benefit. The guardian, upon the decease of one of the three lives, took a new lease for three new lives. The infant died, and it was held that the lease should go to the heirs of the infant, *ex parte paternâ*, for the new lease was to be considered as a new acquisition, and to vest in the infant as a purchase. Lord Hardwicke, in giving judgment said:—"It has been objected that this was an act done by the guardian only, during the minority, and ought not to prejudice any who take by representation, it being an act merely voluntary, and not out of necessity. If this indeed had been wantonly done by the guardian, without any real benefit to the infant, it would have been proper to come into a court of equity to be relieved against it; but here was a just and reasonable occasion for what the guardian has done, *for he was directed by the mother to make purchases for the*

(1) 2 Ves. Jun. 70. (2) 1 Atk. 479.

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benefit of the infant. Here, one life being dead, surrendering the old, and taking a new lease, was the most beneficial purchase for the infant that could be, and therefore ought to have the same consequence as if done by the infant herself at full age."

Thus the case was determined upon the act of the guardian being one which was authorised by the trust. Cases of this class were considered by Sir George Jessel in *Steed* v. *Preece* (1). That was a suit to administer a trust of real estate which was conveyed to trustees upon trust for two infants as tenants in common in tail, with cross-remainders between them. By the decree, which was made while one of the devisees was an infant, the Court ordered a sale, being of opinion that it would be for the benefit of the infant; the lands were accordingly sold; the purchase-money was paid into Court, and the infant's share carried to his separate account. He afterwards died, without having attained twenty-one, and the question was whether the fund in Court belonged to his heir, or to his personal representative. Sir George Jessel, after referring to the question whether, if the Court or the trustee sell more than is necessary, there is any equity to re-convert the surplus for the benefit of the heir-at-law, says, at the conclusion of his judgment:—"But it seems to me that *if the conversion is rightfully made*, whether by the Court or a trustee, all the consequences of a conversion must follow, and that there is no equity in favour of the heir or any one else to take the property in any other form than that in which it is found, and that the sole question to be considered in all these cases is, whether the estate has been *rightfully or wrongfully* sold."

This seems to reduce the question to this: was the deed of 10th December, 1888, assuming its effect to be to vest in the infant an estate of which his heirs would be the special occupants, an act within the authority of the present Lord Mountcashell, and Mrs. Helen Stirling More-Smyth, so as to bind the infant? I understand that the Lord Chancellor considers that it was, having regard to the peculiar nature of an estate *pur autre vie*. As to the nature of that estate there is no difference between the members of the Court.

(1) L. R. 18 Eq. 192.

"As regards such estates," says Brady, L.C., in *Brenan* v. *Boyne* (1), "however they may be limited, whether to A simply, or to A and his assigns, or to A and his heirs, or to A and his executors or administrators, A has the whole dominion of such estate during his life, and may dispose of it to whom and in what manner he pleases. At the common law he could do this by deed; and by the Statute of Frauds, prior to the late Wills Act, and since by the third section of that Act, he can do so by devise. In exercising this power, he may change as he pleases the limitations of the tenure. Even though his own grant be to his heirs and assigns, he can convey the estate to a grantee singly by name, without more, or he may convey it to the grantee, his heirs and assigns, or to the grantee, his executors and administrators, thus changing the whole character of the estate, and converting the freehold into personalty." Later on, at p. 95, referring to the doctrine of special occupancy, he says:—"According to this doctrine, when an estate is given to A and his heirs for the life of B, the heirs of the grantee are considered to be special occupants, who will succeed to the estate, *per formam doni*, on his death, not, strictly speaking, as deriving the estate through him, as in the case of a fee-simple, but as succeeding to the occupancy thereof to the exclusion of any general claimants. Their estate may be in some sense treated as a remainder, but it is defeasible by the grant or devise of the tenant, as in the case of a fee-simple."

I am willing to admit that if a person of full age is entitled to the grant of an estate *pur autre vie*, under a contract such as the present, which does not provide for special occupancy, a court of equity, in a suit for specific performance of that contract, would direct the conveyance to be made, at the election of the grantee, either to him and his heirs, or to him and his executors and administrators, or perhaps to him *simpliciter*; but it appears to me that such a result would ensue because the grantee had power so to convey the estate; and the court of equity would treat his election, if properly declared in writing, as an exercise of his power of disposition. The only *act*, however, by which, in my opinion, the devolution of such an estate can be changed, is an act

(1) 16 Ir. Ch. R. 94.

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of an owner competent to pass the estate, either at law or in equity, such, for instance, as a conveyance or a will. Lord Coke recommends an assignment for this purpose (Coke Littleton, 41 *b*):—"If he hath already an estate for another man's life, without these words," *i. e.* "his heirs and assigns," "then it were good for him to assign his estate to divers men and their heirs." Unquestionably the common law doctrine was that the heir taking as special occupant, took *per formam doni;* and Mr. Jarman says that the devolution of the estate is regulated by the words of limitation contained in the last conveyance, without regard to the mode of its original creation.

It is, however, unnecessary in this case to say more than this, that the act which can effect this change is an act of *disposition* of the estate, and must be the act of the owner of that estate competent to dispose of it. If an estate for the life of A, created without words of limitation, be granted to B, without words of limitation, in trust for C, the estate, upon the death of C intestate, living A, would under the statute pass to the personal representative of C. Can B, by executing, without the consent of C, a deed, whereby he declares that he holds in trust, not *simpliciter* for C, but for C and his heirs, so alter the character of C's equitable estate, that upon his death intestate it will pass, not to his personal representative, but to his heir? I am emphatically of opinion that he cannot.

As to the second question, I am of opinion that under the express trust declared by the deed of the 10th December, 1888, the personal representative, and not the heir, is entitled. The words of the *habendum* are "to hold the same unto and to the use of the said Charles William More-Smyth, and Helen Stirling More-Smyth, and their heirs, during the life of the said Charles William More-Smyth, upon the trusts, and by with under and subject to the powers provisoes agreements and declarations contained in the said agreements of the 25th day of November, 1886, and the 24th day of February, 1888, or such and so many of the same as are now capable of taking effect." What were the trusts contained in the agreements which, immediately previous to the execution of the deed of 10th December, 1888, were capable of taking effect? In my opinion, the only

trust within that description was one for the infant, of such a character that on his death under age the subject of it would pass to his personal representative. I am of opinion that, having regard to 7 Wm. 1 & 1 Vict. c. 26, that trust was the same identical trust for the infant, his executors and administrators, as it would have been if the words "executors and administrators" had been contained in the agreements themselves, instead of being implied by the statute. I therefore hold that the trust declared by the deed was, in substance, for the infant, his executors and administrators.

For these reasons I agree that the decree appealed from should be reversed.

FITZ GIBBON, L.J.:—

The root of all the minor's rights is the agreement of February 24th, 1888, which provides that all the rights and interests to which, under the prior agreement of the 25th November, 1886, Richard Charles More-Smyth, if he were then living, would then be entitled, should belong and pass (with an immaterial variation as to certain amounts) to his son Claude Stephen More-Smyth absolutely.

It occurs to me that the first ground of difference between us and the Master of the Rolls is that he treated the rights of the minor as remaining to be created, or at least to be defined, after the agreement, whereas we regard him as entitled, from and through the agreement of February 24th, 1888, to whatever his father, if living, would then have had under the agreement of 1886. The agreement of 1886 does not name a special occupant. When a tenant for life assigns his estate to another person the assignee becomes a tenant *pur autre vie*, and his estate comes under the rules of the Wills Act and the Statute of Frauds. If Richard More-Smyth had lived to carry out his agreement, and a deed had been executed in the same terms, or no further instrument had been perfected, I think that on Richard's death, during the estate *pur autre vie* of the lunatic, Richard's personal representative must have taken his share of the rents. The question then is—What is the effect of the indenture which was executed to carry out the agreement of 1888? I hold that its only effect was to make Charles William

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and Helen More-Smyth trustees for Claude, of whatever Claude took under the previous agreement; and that the introduction of the word "heirs" in the limitation to the trustees does not name a special occupant to take on the death of the *cestui que trust*, and in that sense does not affect the character of the property, nor take it out of the operation of the Wills Act. *Philips* v. *Philips* (1) was before so many Courts, each of which decided differently, that it can hardly be called an authority; but if the last decision reported in Peere Williams is right it is very like this case. The lands were devised to trustees *and their heirs* to be divided between the testator's wife and daughter during the wife's life, and after her death to the use of the daughter in tail, with remainders over. The daughter died without issue and intestate, during the mother's life; and the question was, whether the testator's heir-at-law, or his wife, should take the daughter's moiety during the wife's life. Mr. Peere Williams, after giving his own argument, states that the mother brought a bill for an account of the profits of the daughter's moiety since her death, on which he held that they were joint tenants, and that all survived to the mother. Upon appeal, Lord Somers (the Lord Chancellor), held they were tenants in common during their joint lives, that the daughter's estate determined by her death, and that the remainderman then took her moiety. Afterwards Lord Keeper Wright, upon a re-hearing, was of opinion that an estate by implication arose to the mother in the daughter's moiety, after the daughter's death, but he referred it to the Court of Common Pleas for their opinion; and the Judges there held that it was a tenancy in common, and that the mother should have a moiety of the profits during her life, and that the other moiety *by the Statute of Frauds* should go to the administrator of the daughter, and not to the heir-at-law. No doubt, the mother might have got it either as surviving joint tenant, tenant by implication, or as executor of her daughter (which she was), but the Common Pleas decision is an authority that naming the heirs of trustees will not be equivalent to naming a special occupant to take on the death of the *cestui que trust*, and will not oust the executors. The same point is involved in *Reynolds* v. *Wright* (2),

(1) 1 P. Wms. 34; 2 Vern. 430; 1 Ld. Raym. 721; 3 Br. P. C. 297.

(2) 2 De G. F. & J. 590.

and upon that ground I think that we have here an equitable beneficial estate *pur autre vie*, and there being no special occupant, and Claude taking what Richard agreed for, it goes to the personal representative.

It is immaterial to my decision, and I have not come to any definite conclusion on the question of *alteration* of the devolution of the estate by the Indenture. I agree with the Lord Chief Baron that strangers or trustees cannot alter the property of infants, but I doubt that merely naming a special occupant necessarily *alters* the property. It is conceivable that it might be reserved until after an agreement to *define* the special occupant, and so doing would not change, but would only *fix*, the character of the property. The Wills Act facilitates that construction, because it apparently allows the special occupant to be named at any time, and deals only with the case when he has not been named, in which case he who is named as executor shall take. If Richard More-Smyth had lived and a deed had been subsequently prepared naming either the heir or the executor, that is to say limiting the property in trust either for Richard his heirs and assigns, or for Richard his executors administrators and assigns, it would not, in my opinion, change the character of the property, though it would have defined what had previously been undefined, and would have taken the case out of the Wills Act by naming a special occupant. But as I cannot give to the introduction of the words of limitation with regard to trustees, the effect which the Master of the Rolls has given them, I cannot hold that any special occupant has been named either expressly or by implication, and therefore in my opinion one half of the property must go to the executor of the infant, who was tenant *pur autre vie* for the life of his grandfather.

Solicitor for the plaintiff: *R. W. Peebles.*
Solicitor for the defendant: *W. Buckley.*

R. D. M.

V.-C.
1894.
Jan. 22.
May 15.

CRANFIELD, Deceased; MOSSE *v.* CRANFIELD.

(1893. No. 762.)

Will—Demonstrative legacy—Inaccurate description—Abatement.

By her will the deceased recited that she was absolutely entitled to the sum of "£500 invested in the Australian Bank on deposit receipt, and also to the sum of £200 on deposit receipt in Messrs. G.'s, making together the sum of £700," and bequeathed to her son J. £300, to her daughter D. £200, and to her daughter E. £200, portions of said sum of £700. At the time of making her will, and at the time of her death, the testatrix had not any sum on deposit receipt in Messrs. G.'s nor any sum on deposit receipt in the Australian Bank, but there were standing in her name eleven shares in the Union Bank of Australia:—

Held, that the shares in the Union Bank of Australia passed under the bequest of the sum on deposit receipt in the Australian Bank.

Originating Summons to determine whether certain legacies of £300, £200, and £200, given by the will of Sarah Cranfield, deceased, to her son John George Cranfield, and to her daughter, Dora E. Mosse, and to her granddaughter Lennox Emma de Rhodes who was a minor, respectively, should abate wholly or in part. By her will dated the 23rd February, 1885, Sarah Cranfield, who died on the 26th July, 1892, after directing the payment of her debts, gave certain legacies, and disposed of the rest of her property in the following terms:—"Whereas I am absolutely entitled in my own right to the sums of £500 invested in the Australian Bank on deposit receipt, and the sum of £200 also on deposit receipt in Messrs. Goulding's firm of Cork, the said sums making together the principal sum of £700, I bequeath to my son John George Cranfield £300, part of the aforesaid sum of £700 absolutely; I bequeath to my daughter Dora E. Mosse £200, part of the said sum of £700 absolutely; and to my daughter Emma Eliza de Rhodes I bequeath the sum of £200, being the remaining part of the aforesaid principal sum of £700 for her life for her sole and separate use, and after her death to my granddaughter Lennox Emma de Rhodes"; and testatrix appointed her said son John George

Cranfield her residuary devisee and legatee, and appointed one Thomas Pounder and the plaintiff William Mosse to be trustees and executors of her will.

Testatrix died on the 26th July, 1892, and probate of her will was granted on the 11th February, 1893, to the plaintiff.

The summons came before the Vice-Chancellor on the 22nd January, 1894, who made an order directing an inquiry whether the testatrix, Sarah Cranfield—1st, at the time of making her said will, and, 2nd, at the time of her death—was possessed of any, and if so what, money on current account, or deposit receipt or any stocks or shares in any, and if so what, Australian Bank? The Chief Clerk by his certificate dated the 20th April, 1894, found that "at the time of making her will, and at the time of her death, she was not possessed of any money on current or deposit receipt in any Australian Bank; and was not possessed of any stocks or shares in any such Bank, save eleven Union Bank of Australia shares standing in her own name, at the time of her death, which she purchased in the year 1873, and which were sold by plaintiff as her executor after her death, and realized a sum of £579 7*s.* 6*d.*" After payment of testatrix' debts there remained £491 5*s.* balance of the proceeds of the shares in the executor's hands. The testatrix had no money on deposit receipt in Messrs. Goulding's, nor any other property except the shares in the Union Bank of Australia. Emma Eliza de Rhodes had predeceased the testatrix, leaving her daughter, the minor defendant, surviving.

Dixon, for the plaintiff.

Carton, Q.C., for the minor defendant, one of the legatees:—

The shares in the Union Bank pass under the bequest of the money on deposit receipt in the Bank of Australia. There is nothing else to answer the bequest. In *Gallini* v. *Noble* (1) a bequest of all the testator's money in the Bank of England was held to pass stock in the funds, testator having never had any cash in the Bank. "Money in Bank" passes shares in Bank: *Brennan* v. *Brennan* (2); *Conly* v. *Green* (3); *Townsend* v. *Townsend* (4); *Lindgren* v. *Lindgren* (5).

(1) 3 Mer. 691.
(2) Ir. R. 2 Eq. 321, at p. 324.
(3) Ir. R. 5 Eq. 431.
(4) 1 L. R. Ir. 180.
(5) 9 Beav. 358.

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Cherry, for the residuary legatee:—

The bequest fails. In *Brennan* v. *Brennan* (1) and *Conly* v. *Green* (2) the words used were not specific. Here the words are specific. When words are used which clearly point to a specific thing the Court cannot give effect to the testator's intention if the testator was not possessed of that specific thing: *Waters* v. *Wood* (3); *Miller* v. *Travers* (4); *Morrice* v. *Aylmer* (5). In *Dillon* v. *Arkins* (6) it was held that "shares" did not include debentures.

May 15.

THE VICE-CHANCELLOR:—

This case goes a little farther than any of those cited, but it comes within the principle of *Brennan* v. *Brennan* (1), and the other cases cited where the testator intended the subject-matter to pass but had wrongly described it. Here the testatrix had nothing whatever except these shares in the Union Bank of Australia. No doubt the testatrix uses an incorrect description, but she had nothing else. The bequest must fail altogether unless thus construed. *Dillon* v. *Arkins* (6) is distinguishable from the present case. There the testatrix had shares to which the description in her will applied, as well as debentures, which it was sought to include in the bequest.

The testatrix intended to leave something; that something was sufficiently akin to what she had to leave. The legacies are good so far as the shares sold for £500. The testatrix had nothing in Messrs. Goulding's, and to that extent the legacies must abate rateably.

Declare that the shares in the Union Bank of Australia passed under the gift of money on deposit receipt in the Australian Bank, and that, so far as the several legacies of £300, £200, and £200, are payable out of £200, on deposit receipt in Messrs. Goulding's firm, they abate rateably.

Declare the parties entitled to their costs out of the fund.

Solicitors for the plaintiff: *Fox & Corcoran.*

Solicitors for the minor defendant: *Larkin & Co.*

Solicitor for the defendant John Geo. Cranfield: *E. W. Carr.*

T. H. M.

(1) Ir. R. 2 Eq. 321.
(2) Ir. R. 5 Eq. 431.
(3) 5 De G. & Sm. 717.
(4) 1 Moore & Scott, 342.
(5) L. R. 7 H. L. 717. [636.
(6) 13 L. R. Ir. 557; 17 L. R. Ir.

REYNOLDS, DECEASED; M'MAHON *v.* FETHERSTONHAUGH.

V.-C. 1894. April 25, 28.

(1892. No. 698.)

Following trust money—Appropriation—Lien—Marshalling.

Money identified as belonging to a customer of the deceased, a stockbroker, was lodged by him to the credit of his current account with his Bank. After his death, which occurred on the day after the lodgment, the Bank transferred the balance due to the deceased on his current account to a loan account, on which he was indebted to the Bank, and sold so much of certain stocks and shares (which they held as security for any balance which might be due to them on the loan account) as were sufficient to pay off the entire amount remaining due to them, and thereupon transferred the remaining securities to the credit of the matter to administer deceased's estate:—

Held, that the deceased's customer was entitled to follow the money identified as his, and to stand in the place of the Bank, and to have the benefit of their lien on the securities lodged in Court.

ADJOURNED SUMMONS on behalf of James F. Darcy, that he might be declared owner of so much of the Waterford and Limerick Railway of Ireland Stock, transferred by the Bank of Ireland to the credit of the matter as should be of the value of £433 5*s.*, or that he might be admitted to claim against the assets of the deceased for that amount. The applicant, in an affidavit filed in support of the summons, stated that he had in September, 1892, employed the deceased, who had been a stockbroker, to sell £400 4½ per cent. preference stock of the Waterford and Limerick Railway, and that he afterwards received the deeds of transfer from the deceased, and executed them and returned them to him.

The deceased received from the brokers for the purchaser their cheque on the Bank of Ireland for £433 5*s.*, the amount of the purchase-money of the said shares, which, deducting Mr. Reynold's commission, left £428 17*s.* payable to Mr. Darcy. This cheque was payable to "Reynolds or bearer," and was lodged on the day it was received, 7th September, 1892, to the credit of his current

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account with the Bank of Ireland. At the time of lodging the cheque the deceased had two accounts with the Bank, one his current account, on which he had a balance to his credit, the other a loan account, on which he was indebted to the Bank, but which was amply secured. On the 8th Sept. Mr. Reynolds died without having paid to Mr. Darcy the price of the stock sold for him. On the 16th September the Bank appropriated the entire credit balance of deceased, amounting to £818 9*s.* 4*d.*, towards payment of the amount due to them on the loan account, and discharged the balance due, by sale of some of the securities. The remainder of the securities, consisting of forty-nine shares of the nominal value of £50, representing £2450 Waterford and Limerick Railway Stock was transferred by the Bank, to the credit of the matter. The defendant was the administratrix of the deceased.

R. E. Meredith, Q.C., and *Sheil*, for the applicant :—

Money handed to a broker may be followed so far as it can be traced. A stockbroker acts in a fiduciary capacity for his employer : *Ex parte Cooke* (1) ; *Taylor* v. *Plumer* (2) ; *Hancock* v. *Smith* (3). Mr. Darcy had a clear lien, which attached to one fund. The Bank had notice of his claim, and should marshal. The drawer of a cheque must be taken to have drawn out his own money where there is a mixed fund : *Hallett's Estate* (4) ; *Frith* v. *Cartland* (5) ; *Pennell* v. *Deffell* (6). In *The Ulster Building Society* v. *Fitzsimon* (7) more money had been drawn out than had been lodged, and it was impossible to trace the fund. Here the cheque is clearly identified as the proceeds of Mr. Darcy's shares. To the extent that the Bank was paid by Mr. Darcy's money, he is entitled to stand in the shoes of the Bank. It was a breach of duty of the deceased to place his customer's money in a position where the Bank could appropriate it.

[Counsel also referred to *Trimmir* v. *Bayne* (8) ; *Broadbent* v. *Barlow* (9) ; *Ex parte Alston* ; *Re Holland* (10).]

(1) 4 Ch. Div. 123.
(2) 3 M. & S. 562, at p. 575.
(3) 41 Ch. Div. 456.
(4) 13 Ch. Div. 696.
(5) 2 H. & M. 417.
(6) 4 De G. M. & G. 372.
(7) 25 L. R. Ir. 24.
(8) 9 Ves. 209.
(9) 3 De G. F. & J. 570.
(10) L. R. 4 Ch. App. 168.

Kenny, Q.C., and *George C. Green*, for the defendant :—

There was no breach of trust in the present case. The shares were handed by Mr. Darcy to the deceased to be sold, and they were sold. As against the general creditors of the deceased, Mr. Darcy is not entitled to a preferential payment. The Bank before notice appropriated the £818 balance on the current account to the partial payment of the loan. Mr. Darcy's money has only been identified up to the appropriation by the Bank, when the fund at once became dissipated. The deceased's money cannot be traced into the securities held by the Bank, for there has been no purchase of these by the Bank, but only a reduction of their debtor's liability. In both *Broadbent* v. *Barlow* (1) and *Ex parte Alston* (2) there was a breach of duty by the trustee. Here no breach of duty is even alleged. Once a mixed fund has been paid away the trust fund can no longer be followed : *Ulster Building Co.* v. *Fitzsimon* (3).

The applicant can only trace the money to an equity, and then says he has an equity to go farther.

April 28.

THE VICE-CHANCELLOR :—

The principles of equity applicable to this case are clear and well established. It appears that Mr. Darcy employed the deceased in this matter to sell certain shares for him, which he accordingly sold, and was paid by the broker for the purchaser. Mr. Reynolds lodged the cheque which he received in payment, together with a small sum of money, to his current account on 7th September. He had at the same time a loan account, on which there was a considerable balance due to the Bank. Mr. Reynolds died on the following day, and the case is not complicated by any drawings against that lodgment. As the tree fell so it lay. There was £818 due to Reynolds by the Bank on his current account, while on his other account, which was a fully secured loan account, there was a balance due to the Bank.

There is as clear proof of identity as could possibly be required, and Mr. Darcy's money is traced into the £818. There is no

(1) 3 De G. F. & J. 570. (2) L. R. 4 Ch. App. 168. (3) 25 L. R. Ir. 24.

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question as to that. What was the consequence of Reynolds lodging this money in the way he did? The very moment it was lodged it became liable to the Bank's lien. The Bank had a clear right to appropriate this £818 to the debt due to them on the loan account, but the equity which Mr. Darcy had of marshalling against the securities held by the Bank was not thereby disturbed. The Bank have paid themselves out of Mr. Darcy's money, and *pro tanto* released the securities which have been lodged in Court, and the equity which Mr. Darcy had to marshal against those securities could not be disturbed by the action of the Bank in lodging the securities in Court. The rights of the parties are the same as if the securities were still in the hands of the Bank, and I hold that Mr. Darcy is entitled to stand in the place of the Bank as to these remaining securities, and accordingly I must declare that he has a lien on the fund brought in by the Bank of Ireland to the credit of this action for the sum of £428 17*s.*, portion of £818.

The defendant must have her costs in the action, and Mr. Darcy is entitled to his costs with his demand.

Solicitors for the applicant: *D. & T. Fitzgerald.*
Solicitors for the plaintiff: *Maxwell, Weldon & Co.*
Solicitor for the defendant: *Joseph E. MacDermott.*

T. H. M.

In re ARMSTRONG.

(1892. No. 788.)

V.-C. 1894. May 1.

Jointure and portions charged on lands—Postponement of jointure in favour of mortgagee of portion—Intervening portion—Priorities.

Lands were subject to a jointure, and, as a next charge, to a sum for portions. The second appointee in date of part of the portion-money mortgaged his share, and the jointress postponed her jointure in favour of the mortgagee: *Held*, that the postponement was to be treated as an equitable assignment, and that the jointress had not thereby postponed her jointure to the first appointee's share. Rights and priorities of the parties considered.

Summons by Frances Georgina Bell and her husband John Alexander Bell to vary the Chief Clerk's certificate.

Under her marriage settlement, dated the 29th December, 1834, Lady Armstrong was entitled to a jointure of £600 per annum, charged on (amongst other hereditaments) a fee-farm rent of £120 2*s.* 10*d.*, and had power to appoint amongst her younger children a sum of £9000, the next charge on the property.

By deed dated the 10th April, 1865, Lady Armstrong appointed £1200 to Andrew Charles Armstrong, one of the younger children.

By deed dated the 15th December, 1875, she appointed £1120 to another son, Montague D. F. Armstrong.

By deed dated the 22nd March, 1877, she appointed the residue of the said £9000 (£6680) amongst her six remaining younger children, George Alexander Armstrong, Frances Georgina Bell, and four others in equal shares.

By deed dated the 23rd March, 1877, Montague D. F. Armstrong assigned his said portion to the Rev. William Eustace by way of mortgage, to secure the repayment of a sum of £1120, and Lady Armstrong postponed her jointure in favour of the mortgagee.

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By deed dated the 12th November, 1879, Sir Edmund F. Armstrong, who was then entitled to the property for his life, mortgaged his estate to the Scottish Provident Institution to secure the repayment of a sum of £950, and Lady Armstrong on this occasion also postponed her jointure to the said loan.

The mortgage debt of £1120 became vested in Charles Graves and George Battersby.

The mortgage debt of £950 became vested in Andrew Charles Armstrong.

Lady Armstrong died on the 19th March, 1890, having by her will appointed the said Frances Georgina Bell her residuary legatee and Andrew Charles Armstrong her executor. The latter obtained a grant of probate.

George Alexander Armstrong died. Andrew Charles Armstrong was his administrator.

The fee-farm rent was redeemed under the Land Purchase Acts, and the redemption-money was, pursuant to an order of the Irish Land Commission, lodged in the High Court [see the Landed Estates Court Act (21 & 22 Vict. c. 72), s. 70], and was now represented by £2122 16*s.* 2*d.* New Consols and dividends on same.

On the petition of Andrew Charles Armstrong an order was on the 28th November, 1892, made by the Vice-Chancellor, that an inquiry be made at Chambers as to who were entitled to the funds in Court, and that the said funds be allocated in accordance with the result of the said inquiry.

£670 only, besides interest, remained due on foot of the sum of £1200 appointed to Andrew Charles Armstrong, and £521 1*s.* 7*d.* on foot of the sum of £1120 appointed to Montague D. F. Armstrong. £805 1*s.* 2*d.* was due for arrears of Lady Armstrong's jointure.

The Chief Clerk, by his certificate filed the 2nd March, 1894, found that the persons entitled to the funds in Court were:—

1. Andrew Charles Armstrong to £670 (balance of the £1200 appointed to him) and interest.

2. Charles Graves and George Battersby to £521 1*s.* 7*d.* (balance of the £1120 appointed to Montague D. F. Armstrong) and interest.

3. Andrew Charles Armstrong, as administrator of George Alexander Armstrong, and the other appointees under the deed of the 22nd March, 1877, to the remainder in equal shares (being on account of the £6680 appointed by that deed).

The applicants now applied to have the £805 1*s.* 4*d.* arrears of jointure inserted as the first item, contending that if this sum were not required to meet the claims of Charles Graves and George Battersby, as assignees of the £1120 mortgage, and of Andrew Charles Armstrong, as assignee of the £950 mortgage, it should be paid to the latter as personal representative of Lady Armstrong.

The deed of the 23rd March, 1877, was made between Montague D. F. Armstrong of the first part, the Rev. Sir Edmund F. Armstrong of the second part, Dame Frances F. Armstrong of the third part, and the Rev. William Eustace of the fourth part. It recited amongst other things, "And whereas the said Rev. Sir Edmund F. Armstrong and Dame Frances F. Armstrong have agreed to join in these presents, the former for the purpose of securing the payment of the interest on said loan, and the latter for the purpose of postponing her jointure to the said charge or appointed sum of £1120." It witnessed that Montague D. F. Armstrong assigned to the Rev. William Eustace the said appointed sum of £1120, subject to redemption; and also witnessed that the said Dame Frances F. Armstrong "doth hereby for herself, her heirs, executors, administrators, and assigns, covenant with the said Rev. William Eustace, his executors, administrators, and assigns, that the said jointure of £600 a-year, and every part thereof shall stand and be postponed as a charge upon the hereditaments hereinbefore mentioned to the said appointed sum of £1120 and to the said mortgage debt of £1120 hereby secured, and all interest thereon respectively, and that the said jointure or any part thereof shall not be raiseable or raised out of the said hereditaments until after full payment of the sum of £1120 and all interest thereon. Provided always that as between the said Dame Frances F. Armstrong and the said Montague D. F. Armstrong the said jointure is postponed merely to this present security, and such postponement shall cease upon payment of the mortgage debt hereby secured, and shall not extend to any subsequent mortgage of the said sum of £1120."

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The deed of the 12th November, 1879, was made between Sir Edmund F. Armstrong of the first part, Dame Frances F. Armstrong of the second part; the Scottish Provident Institution of the third part, and James Watson of the fourth part. It recited that Sir Edmund F. Armstrong was seized of an estate for his life in the lands, free from incumbrances, save the jointure of £600 payable to the said Dame F. Armstrong during her life, and a certain charge or principal sum of £7230 (1) affecting the inheritance of the said lands; that Sir Edmund F. Armstrong had effected a policy of assurance on his life; that he had applied to the Scottish Provident Institution to advance £950 at interest upon the security of his life estate and the postponement of said jointure of £600 to the aforesaid sum of £950 proposed to be advanced, together with the policy of assurance as thereinafter provided; that the said Dame F. Armstrong had agreed to postpone her said jointure to the said sum of £950, so that the said last-mentioned sum should be the first charge on said life estate; that the said institution had agreed to advance the said sum on having the repayment secured by a mortgage of Sir Edmund F. Armstrong's estate for life in the said lands, with said jointure postponed as aforesaid, in the manner thereinafter appearing as well as by the assignment of the policy. The deed, amongst other things, witnessed that Sir Edmund F. Armstrong demised the lands to the Scottish Provident Institution for 199 years, if he should so long live, subject to redemption, and further that the said Dame F. F. Armstrong "doth hereby for herself, her executors, administrators, and assigns, postpone the aforesaid jointure or annuity of £600 a-year, and all and every payment thereof to the said sum of £950 so advanced or intended to be advanced by the said Scottish Provident Institution to her son the said Sir E. F. Armstrong, and all interest thereon, so that the said sum of £950, with the interest payable thereon, shall at all times be and be deemed to be the prior charge and incumbrance affecting the estate for life of the said Sir E. F. Armstrong of and in the said several lands, hereditaments, and premises."

(1) This appears to refer to the balance remaining due of the £9000.

T. P. Law, Q.C., for the applicants :—

The arrears of jointure should have been placed first on the schedule. The jointure was postponed only for the purpose of the security created by the mortgages; and subject to the claims of the incumbrancers the applicants are entitled to the arrears. The principle applicable is that adopted by Master Brooke in ——— v. *M'Cowan* (1); see also Fisher, Law of Mortgage (4th Ed.), 582. A similar practice was established in the Landed Estates Court by Judge Lynch in *Eyre's Estate* (2), and followed by Mr. Justice Monroe in *Simpson's Estate* (3). *Peacocke* v. *Harold* (4) shows that the practice in this Court will be the same as in the Land Judge's Court.

Twigg, Q.C., for Andrew Charles Armstrong as administrator of George Alexander Armstrong :—

The postponements had the effect of placing the jointure for all purposes below the portion or other interest mortgaged, with the result that the intervening portions also obtained priority over the jointure. The deed of the 23rd March, 1877, had the effect therefore of placing Andrew Charles Armstrong's portion first in priority, while the deed of the 12th November, 1879, further removed the jointure below the amount appointed by the deed of the 22nd March, 1877. The principle of *In re Huthwaite* (5) applies. That case has been acted on ever since: see *In re Lowe* (6).

The question first arose on the Registry Act, 6 Anne, c. 2, in *Latouche* v. *Lord Dunsany* (7), where it was decided that an unregistered deed was for the sake of a subsequent registered deed void against an intervening judgment. Lord Redesdale in that

(1) 7 Ir. Jur. 389.

(2) Ex rel. *Price, Q.C.* Estate of Thomas Stratford Eyre the Elder, Thomas Stratford Eyre the Younger, and Allan Pollock, Owners; The Scottish National Insurance Company, Petitioners. Petition filed the 5th April, 1867. No. 3790. The schedule and rulings were produced in Court, and referred to by counsel.

(3) Ex rel. *J. Herbert Shaw.* Estate of Charles Henry James and others, assignees of Lydia Simpson and Andrew Millar Millar, bankrupts, Owners; John Givan, Petitioner. Petition filed the 4th July, 1881. No. 1094.

(4) 21 L. R. Ir. 351.

(5) 2 Ir. Ch. Rep. 54.

(6) 4 Ir. Ch. Rep. 97.

(7) 1 Sch. & Lef. 137.

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case, referring to section 5 of the Registry Act, says (p. 161) :— "The effect of the clause so construed is to give such judgment creditors not only the priority which they would before have had against the registered deed, but a priority against the unregistered deed which they had not before, and that for the sake of the registered deed; for the several incumbrances could not otherwise be arranged for the benefit of the registered deed."

The same principle was applied to unredocketted judgments in the case of *In re Huthwaite* (1). In ——— v. *M'Cowan* (2), where there was a contest between a deed for value and a voluntary deed, Master Brooke seems to have adopted a different principle; but that case does not appear to have been acted on or cited as an authority in any subsequent case, and the case of *Barclay* v. *O'Brien* to which he refers (page 390) must be taken to have been overruled by the principle which was established in *In re Huthwaite* (1).

There are two modes of giving to a lender priority over a charge—one by assigning the charge to him, the other by postponing it. The former is the more common mode, and the result of it is to enable the lender to stand upon the estate in the priority of the charge which is assigned: but the simple postponement of a charge does not give the lender any such position.

The deed of the 23rd of March, 1877, recites that Lady Armstrong had agreed to join for the purpose of postponing her jointure, and by it she covenants that her jointure shall stand and be postponed to the appointed sum of £1120, and the mortgage debt thereby secured. "Postponed" is the word used, and it means put below the portion of £1120.

The deed of the 12th Nov., 1879, recites that the estate was subject to charges; it recites the application for a loan of £950 on the security of the life estate and the postponement of the jointure; that Lady Armstrong had agreed to postpone her jointure to the said sum of £950, so that it should be the first charge; the agreement by the mortgagees for the advance on having the repayment secured by a mortgage of the life estate, with the jointure postponed; and the deed witnesses that Lady Armstrong post-

(1) 2 Ir. Ch. Rep. 54. (2) 7 Ir. Jur. 389.

pones her jointure to the sum of £950, so that the same shall be and be deemed to be the prior charge and incumbrance affecting the estate for life. There is nothing pointing to any assignment or mortgage of the jointure. The contract was for postponement, and it involves the same principles as *In re Huthwaite* (1).

Drury, for Sir Edmund F. Armstrong.

W. P. Ball, for Andrew Charles Armstrong, as personal representative of Lady Armstrong.

Law, Q.C., in reply :—

The distinction between the present case and those relied on by *Twigg, Q.C.*, is clear, for those cases were decided on the words of Acts of Parliament which declared the deed or judgment void against the registered deed. The present case does not depend on any statute. The question is one of contract, and the argument on the other side amounts to this—that because Lady Armstrong contracted to give priority to two loans of £1120 and £950, she agreed to give priority to all the portions. In answer, it is sufficient to refer to the words of the mortgages by which the jointure is postponed expressly to the sums advanced.

THE VICE-CHANCELLOR :—

As I have formed an opinion on this case, I shall state my views on it—concurring, as they do, with what I am told is the practice in the Land Judge's Court.

It occurs to me that the consequences of the contention put forwarded by Mr. Twigg would be very startling.

The facts in the present case are simple. Lady Armstrong was entitled to a jointure, portions for children being also charged on the inheritance, and if there were nothing more, she would be entitled to be paid up to her death; and, next to her claim, any surplus would go amongst the different appointees in the order of their priorities. That is, however, disturbed by the existence of two assignments, in which Lady Armstrong joined to postpone her jointure. What was her intention in so doing? As far as she

(1) 2 Ir. Ch. Rep. 54.

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was concerned Lady Armstrong was willing, for the benefit of certain of the parties, to stand aside and allow the property to be dealt with. She, accordingly, postponed her jointure, and I agree with the argument of Mr. Law, that the language used cannot interfere with the ordinary effect of such a dealing, there being nothing to show that any one else, besides those to whom she gave priority, was to have the benefit of the postponement. The money was raised, and Lady Armstrong so far postponed her jointure; but it was contended for the appointees other than Montague D. F. Armstrong, and they insist that Lady Armstrong's jointure should not be first paid, but that the appointees should be paid in priority to it, the effect of which would be that Lady Armstrong would have given priority, not only to the charge to which she expressly gave precedence, but would have carried up other charges above her jointure.

That certainly would be a strong proposition, and one I would not yield to unless I saw no other alternative in administering the rights of the parties.

I can do what the parties meant by ascertaining the arrears of jointure due. According to the original priority that would be the first sum payable out of the funds in Court; but Lady Armstrong has said to the Rev. William Eustace, "I will not allow my jointure to interfere with you, but will place you in the position I am in before executing the deed, and you shall have the benefit of the priority of my jointure as if I had postponed it in a literal sense." Therefore the money applicable in the first instance to pay the jointure would go to Mr. Eustace's assignees to the extent needed to pay them in full, and the other appointees would come in in their regular priorities. Mr. Eustace's assignees would come in a second time. Lady Armstrong did Mr. Eustace no wrong: she merely handed over her jointure money to him instead of putting it in her own pocket.

Next after the arrears of jointure will come the first appointee, Andrew Charles Armstrong, and then Mr. Eustace's assignees, if not paid in full out of the arrears of jointure will, to the extent of the balance of their charge, get the amount remaining due of Montague's appointed share, the jointress, or those deriving under her, coming in in Montague's place to the extent to which his

mortgagees were paid out of her funds for the residue (if any) of his share.

Next, the residue of the £9000 will go to the other children.

The principle to be acted on I hold to be, that the postponements are to be worked out as equitable assignments. The entire arrears of jointure are a first charge, the appointed shares stand in their priorities, and the jointress will stand in the place of the persons paid out of her arrears.

I do not throw the slightest doubt on the cases of *Latouche* v. *Lord Dunsany* (1) or *In re Huthwaite* (2), which have always been regarded as settled law, and which were decided on the words of the Acts of Parliament. Here the matter is different: it depends on the contract between the parties.

I am fortified in my view by the opinions of Master Henn and Master Brooke, both excellent equity lawyers. I have also the authority of Judge Lynch, and I am told the present practice in the Land Judge's Court is based on the same principles.

I disclaim any intention of disapproving of cases on the Registry or redocketting acts.

Solicitor for Frances Georgina Bell and John Alexander Bell: *R. C. Vance.*

Solicitor for Andrew Charles Armstrong, as administrator of George Alexander Armstrong: *A. H. Middleton & Son.*

Solicitors for Sir Edmund F. Armstrong: *Meade & Richardson.*

Solicitor for Andrew Charles Armstrong, as personal representative of Lady Armstrong: *A. H. Middleton & Son.*

D. M'C. M.

(1) 1 Sch. & Lef. 137. (2) 2 Ir. Ch. Rep. 54.

V.-C.
1894.
Nov. 5.

RUTTLEDGE *to* READ.

(1894. No. 643.)

Taxation of costs—Mortgagee's solicitor—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order*, 16*th April*, 1884, *Schedule I, Part I.—Scale charge—Investigation of title and searches.*

Work done by solicitors on the occasion of a mortgage, *held*, under the circumstances of the case, not to amount to an investigation of title and searches entitling them to the scale-charge prescribed for a mortgagee's solicitor by Part I. of Schedule I., to the General Order of the 16th April, 1884, under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44).

Application for review of taxation.

By the will of Robert Ruttledge, dated the 14th September, 1832, certain estates were devised upon trust, subject to debts and legacies, amongst other limitations, for the testator's wife Elizabeth Ruttledge for life, and after her decease for the testator's stepson David Watson for life, with remainders over.

The testator died in 1833; Elizabeth Ruttledge died in 1849; and thereupon David Watson, pursuant to a direction in the will, assumed the name of Ruttledge, and entered into possession. He died on the 16th December, 1890, and his grandson David Knox Ruttledge entered into possession. Thereupon T. H. B. Ruttledge, claiming to be entitled as tenant-in-tail, and others, brought an action against David Knox Ruttledge, for a declaration that upon the death of David Watson Ruttledge, Thomas H. B. Ruttledge became entitled to the estate, subject to any charges thereon prior to the said devise. By the judgment of the Master of the Rolls, dated the 22nd June, 1892, and made on consent, it was declared that upon the death of David Watson, otherwise Ruttledge, the plaintiff Thomas H. B. Ruttledge was, and that he then was, entitled to the possession and receipt of the rents and profits of the said lands and premises, subject to any charges thereon prior to the devise to the said plaintiff, on certain terms in the said judgment mentioned.

Messrs. William Read & Son had been for many years solicitors for David Watson Ruttledge, and they acted as solicitors for David Knox Ruttledge in the said action.

On the 15th October, 1891, John Knox Ruttledge presented a petition for sale of the said lands in the Land Judge's Court, and an absolute order for sale was made thereon, and a receiver appointed. Messrs. Read were solicitors for the petitioner in this matter.

In the course of these proceedings Alfred Ruttledge and John Knox Ruttledge, as executors of David Watson Ruttledge, claimed to be entitled to the sum of £1605 7*s.* 7*d.*, with interest, as a charge on the said lands, in respect of moneys paid by David Watson Ruttledge in discharge of debts and legacies charged on the lands by the will of Robert Ruttledge, and to the further sum of £527 7*s.* 2*d.*, with interest, in respect of moneys advanced by David Watson Ruttledge for the purchase of the fee-simple of portion of said lands which had been held under a church lease.

Messrs. Read acted as solicitors for the executors in relation to their said claims.

On the 21st March, 1892, it was ordered that the examiner should ascertain the priorities of the several charges and incumbrances, and report as to the claims of the executors. The matter came before the examiner, but no report was made up, as Thomas H. B. Ruttledge had entered into negotiations with the incumbrancers to have the petition dismissed, and the receiver discharged, and ultimately the following agreement was entered into:—

By agreement, dated the 8th April, 1893, between Thomas H. B. Ruttledge, David Knox Ruttledge, Alfred Ruttledge, Henry Frend, and John Knox Ruttledge, it was, amongst other things, agreed that the claims of the executors should be admitted as valid claims for the sums of £1200 and £527 17*s.* 2*d.*, making together £1727 17*s.* 2*d.*; that as a further or additional security for the payment of the said sum of £1727 17*s.* 2*d.*, with interest, the said Thomas H. B. Ruttledge should at his own cost forthwith execute and deliver to the executors a mortgage of the fee and inheritance of the hereditaments devised by the will of Robert Ruttledge; that the said mortgage should

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RUTTLEDGE to READ.

be prepared by the solicitors of the executors, and the costs thereof should be paid by Thomas H. B. Ruttledge; that the parties thereto should forthwith sign a consent for the discharge of the receiver; that the balance of moneys collected by him should be applied in payment of the costs of the petitioners and the incumbrancers and receiver in the proceedings in the Land Judge's Court, and then of interest on the incumbrances; that all further proceedings under the order for sale should be stayed, and the petition dismissed; that the costs of the petition, and the proceedings thereunder, including the costs of the claims brought in by the executors, and the costs of, and incidental to, the preparation and execution of the agreement, and the carrying out of the same should, as between solicitor and client, be paid by Thomas H. B. Ruttledge.

The agreement did not contain any recital of a disentailing deed.

The agreement was prepared by Messrs. Read on behalf of all parties, except Thomas H. B. Ruttledge, and it was submitted to his solicitors for approval on his behalf.

Messrs. Read furnished their costs of the proceedings for sale and the claims of the executors. These costs were settled at the sum of £255, and that sum was paid.

Messrs. Read caused a search to be made in the Record and Writ Office for the purpose of seeing if Thos. H. B. Ruttledge had disentailed the lands, and on that search they found that a disentailing deed had been executed by him, dated the 3rd February, 1891. They accordingly, on the 12th June, 1893, wrote to the solicitors for Thomas H. B. Ruttledge for a copy of that deed, stating that they wanted it for the purpose of preparing draft mortgage pursuant to the agreement. This copy was furnished, with a request to pay 10*s.* charges in respect thereof. This sum was included in the bill of costs furnished by Messrs. Read to Thomas H. B. Ruttledge, as was also a charge for the letter of the 12th June, 1893.

The mortgage was completed, stamped, and registered: it conveyed the lands subject to the existing incumbrances affecting them.

Messrs. Read furnished a further bill of costs, including those of and in relation to the mortgage, amounting in all to £63 19*s.* 2*d.* Item 60 was as follows :—

> Solicitor's fee on investigation of Mr. T. H. B. Ruttledge's title, and of preparation and execution of deed of mortgage to secure £1727 17*s.* 2*d.*, and registering same, ... £31 5 0

This is the remuneration prescribed by Schedule I., Part I., to General Order dated the 16th April, 1884, and made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), for a mortgagee's solicitor on a loan of from £1700 to £1750.

The Taxing Master (Master Davis) was of opinion that Schedule I., to the General Order did not apply, and that the costs should be taxed in accordance with the old system as altered by Schedule II. to the said Order. He considered that though there might have been a step towards a deduction of title, there had not been a deduction of title within the meaning of the schedule : *Ferguson to Buckley* (1).

Messrs. Read objected to the Taxing Master's ruling; but he, on the 28th June, overruled the objection.

Messrs. Read appealed. An affidavit of one of the firm stated that, for the purpose of investigating the title, they perused the will, the judgment in the action, the agreement and the disentailing deed; and they also made a hand search in the Registry of Deeds Office for acts by T. H. B. Ruttledge from the death of David Watson Ruttledge to the date of search, which was made by one of the firm on the 9th February, 1894, and as they found no act save the disentailing deed, they did not think it necessary to put the mortgagor to the expense of a negative search, as they were aware that the agreement had been registered, and they were quite satisfied, after the above search, that the lands had not been further incumbered. As to the charge of 10*s.* in respect of the copy of the disentailing deed, they could find no entry of ever having paid same, and the cost-drawer had entered it by mistake.

(1) 21 L. R. Ir. 392.

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Kenny, Q.C., for Messrs. Read :—

In re Lacy & Son (1) is the converse of the present case. There the question was as to the vendor's costs, which were to be paid by the purchaser, and he dispensed with an abstract of title. There was in that case no deduction of title. A solicitor is entitled to the scale-charge, no matter how small the amount of work done may be : *Ex parte Mayor of London* (2), where the only investigation of title was the reading of an Act of Parliament. Much more was done in the present case : Messrs. Read read the judgment of the Master of the Rolls and the agreement, and procured and read a copy of the disentailing deed. In *Ferguson to Buckley* (3) there was no deduction of title, there were no Registry searches. In *D'Arcy to White* (4) it was held, following the principle of *Earl of Aylesford* v. *Earl Poulett* (5), that the word "loan" in Schedule I., Part I., means "money secured by mortgage," and may include the securing of a past debt without any fresh advance. In the present case the solicitors made searches, first in the Record and Writ Office, and afterwards in the Registry of Deeds. It is not for the Court to consider whether in this case the General Order produces a hardship or not, or whether the work done would be overpaid by the scale-charge : see the judgment of Kay, J., in *Ex parte Mayor of London* (2).

Meredith, Q.C., contra :—

The title was well known to Messrs. Read, who had been solicitors in the proceedings before the Land Judge and in the Chancery action. The agreement provides that Thomas Henry Bruen Ruttledge should, at his own cost, forthwith execute the mortgage, and there was no suggestion that there should be any investigation of title. *D'Arcy to White* (4) merely explains the meaning of the word "loan." *Ex parte Mayor of London* (2) was quite different from the present case. There the title depended on an Act of Parliament, which it was necessary to construe, and on perusing which the purchaser's solicitor considered that an

(1) 25 Ch. D. 301.
(2) 34 Ch. D. 452.
(3) 21 L. R. Ir. 392.
(4) 31 L. R. Ir. 142.
(5) [1891] 1 Ch. 248.

authority signed by the Lord Chancellor was essential and he required same to be procured. It is not sufficient that the solicitor performs some part of each of the classes of work mentioned in Schedule I., Part I. The decision in *Ex parte Mayor of London* (1) was that if a solicitor performed all the work in each class he was entitled to the scale fee. In the previous bill of costs furnished by Messrs. Read there is a charge for the letter of the 12th June, 1893, and also for the 10*s.* paid in respect of the copy of the disentailing deed. There was no investigation of title. That letter asks for a copy of the disentailing deed, stating that Messrs. Read wanted it for the purpose of preparing the mortgage. If the title was to have been investigated at all it should (the contract being an open one) have commenced prior to the death of Robert Ruttledge, and been traced through the entire intervening period. For such an investigation of title Messrs. Read would have received £31 5*s.*, as their personal remuneration, costs out of pocket being paid in addition. They made no such searches as are contemplated by the scale. There were neither negative searches nor judgment office searches. See on this point the judgment of the Master of the Rolls in *Ferguson to Buckley* (2). In *Ex parte Mayor of London* (1) everything necessary was done; the solicitor could have done no more. The case of *Re Keeping and Gloag* (3) is nearer to the present than any of those cited.

Kenny, in reply:—

In the case of *Re Keeping and Gloag* (3) the solicitors were instructed for the purpose merely of preparing the necessary deeds; they acted for all parties, and there was no attempt to deduce title. It could not have been intended in this case that the provision in the agreement as to the costs of the mortgage was to apply to the costs of the deed only.

THE VICE-CHANCELLOR:—

In my opinion the Taxing Master was correct in his decision, and it cannot be reviewed. The rule of law applicable to the

(1) 34 Ch. Div. 452. (2) 21 L. R. Ir. 392, 396. (3) 58 L. T. (N. S.) 679.

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case has been laid down in the case of *In re Lacy & Son* (1), decided by the high authority of the Court of Appeal in England. It decides that the entire of the business for which the scale fee is prescribed must be completed and done, and secondly, that there must be some work done under each of the heads mentioned, and if no work is done under some head this takes the case out of the operation of the schedule. It is no matter how small the work done may be. *Ex parte Mayor of London* (2) went a long way, but it is not parallel to the present case, for there the entire title consisted of an Act of Parliament, and the solicitor, by reading the Act of Parliament, was held to have investigated the title.

In the present case, I do not believe that it entered into the contemplation of the parties that there was to be any investigation of title. The position of the parties leads up to that conclusion. There was litigation in which Messrs. Read were acting as solicitors, and they had full knowledge of the facts, and were paid their costs. There was also an investigation in the Land Judge's Court, and they were paid for carrying on those proceedings. They now ask to be paid again for work already paid for. They themselves treated this as work for which they had been paid. The letter of the 12th June, 1893, which is relied on as being part of the investigation of title, has been already charged for. This letter states that the copy of the disentailing deed is required for the purpose of preparing the mortgage.

On these grounds alone I have sufficient to uphold the Taxing Master's decision, and I am of opinion that he was right; but I am also of opinion that there has been nothing in the way of searches to come under that head in the schedule. There was no requisition for searches, and no office searches. The solicitors merely made a hand search for their own information. This would not have been a sufficient search if there was to have been an investigation of title. Their going to the Record and Writ Office to ascertain whether a disentailing deed had been enrolled was a very small matter, and one which does not, I think, sustain their contention. The whole matter turns on whether there has

(1) 25 Ch. Div. 301. (2) 34 Ch. Div. 452.

been an investigation of title and searches. In my opinion there has been neither one nor the other, and I refuse the application with costs.

Solicitors for the applicants: *William Read & Son*, in person.
Solicitors for Thomas H. B. Ruttledge: *T. T. Mecredy & Son*.

D. M'C. M.

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(1894. No. 22.)

Costs—Executors propounding will—Withdrawal of opposition during progress of case—Secret compact—Principles regulating the allowance of costs in contentious proceedings—Equitable jurisdiction.

Plaintiffs, as executors, propounded a will and codicil of a deceased. The validity of the codicil was disputed by the defendants on the grounds of informal execution, want of capacity, that the deceased did not know and approve of its contents, and that its execution was procured by the undue influence of G. and O., two of the plaintiffs. The residuary legatees did not challenge the validity of the codicil, and were not represented at the hearing. The codicil in question bequeathed legacies of considerable amount to the two plaintiffs G. and O., and reduced the amounts of legacies given by the will to the defendants and intervenients, and had the result of reducing the residuary estate. After three witnesses had been examined in support of the plaintiffs' case counsel for defendants withdrew the defendants' pleas, and all charges of undue influence, and all further opposition to the proof of the codicil. Counsel for the plaintiffs then stated that they did not ask for costs against the defendants, but asked to be allowed their costs out of the estate. The Court directed the jury to find in favour of the plaintiffs, and made a decree for probate of the will and codicil; and, being of opinion, on the evidence adduced, that the defendants had no reasonable ground for opposing the codicil, ordered defendants to pay the plaintiffs their costs, refusing to onerate the estate with the payment of such costs.

Previous to the withdrawal of the opposition of the defendants to proof of the codicil, a secret arrangement, embodied in a memorandum of consent or compromise, was entered into between the parties. It was signed by the two plaintiffs G. and O., and by counsel and solicitors representing the parties. It was not intended to be disclosed to the Court. On the refusal of the Judge to

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allow the costs of the plaintiffs to be paid out of the assets, and his direction that the defendants should pay plaintiffs' costs, counsel for plaintiffs, in answer to an inquiry by defendants' counsel, stated they would levy the costs against the defendants. Counsel for defendants then stated that that would be a distinct violation of the arrangement between them, and handed up to the Court the memorandum of consent, which was in the following terms:— "*Ormsby* v. *Good*—Pleas of undue influence and others withdrawn. No costs asked for by plaintiffs against defendants. Plaintiffs and their solicitors to pay the defendants £900 on foot of all costs."

On motion to vary the minutes of the judgment so far as the same provided that the defendants should pay the costs of the plaintiffs:—

Held (1), that although the consent was intended to be kept secret, still, on the construction that its effect was to release the defendants from liability to pay costs, their counsel was at liberty to disclose it to the Court, when he was informed that the plaintiffs would levy their costs, as given to them by the order of the Court, against the defendants.

(2) That it was not necessary to leave the consent to be interpreted in a subsequent independent proceeding *inter partes;* but that once the consent became known to the Court, it ought not, as between the parties, to make any award of costs contrary to the letter and spirit of the compact.

(3) That the necessary effect of the consent, as between the parties to it, was to discharge defendants from any obligation to pay the costs of plaintiffs, and that, even if that were not its strict legal construction, it would be inequitable and contrary to the honour of the transaction to make defendants pay the costs of the plaintiffs.

Held, also, that as the estate ought not, under the circumstances, to be onerated with the payment of the costs of the plaintiffs, and as they had forfeited their right to be paid same by defendants, such costs, as between party and party, must be borne by plaintiffs themselves.

In dealing with costs in cases of compromise of contentious Probate proceedings there are three possible courses which may be adopted:—1. The Court may form its opinion of the reasonableness or unreasonableness of the opposition from the course of the trial and the evidence actually given before the compromise is arrived at. 2. The Court may refuse to make any specific adjudication as to costs. 3. Or, perhaps, in a certain class of case, the Court may itself inquire into the reasonableness of the opposition by calling witnesses or otherwise.

GERVAS LENNOX TAYLOR, late of 21, Molesworth-street, Dublin, died on 31st January, 1894, aged 83 years, leaving assets valued at about £86,000. He made a will and codicil, dated respectively 7th December, 1882, and 16th October, 1893. By the will, after leaving a number of legacies to friends, relatives,

and servants, amounting to about £20,000, and about £40,000 to various hospitals and other institutions, including £8000 to the Adelaide, and £2500 to Mercer's hospital, he bequeathed the residue of his property between the Irish Church Education Society and the Church of Ireland Representative Body. The validity of the will was not disputed. By the codicil he bequeathed a number of other legacies, including £5000 to Mr. Robert Gibney (in addition to £500 left to him by the will), £3000 to his friend and medical attendant Surgeon Ormsby for his kindness and attention to him during many years; and he reduced the bequests to the Adelaide and Mercer's hospitals to £5000 and £1000 respectively. The validity of the codicil was disputed by the Governors of these two institutions, on the grounds of informal execution, want of capacity, that the deceased did not know and approve of its contents, and that its execution was procured by the undue influence of Surgeon Ormsby and Mr. Robert Gibney. Plaintiffs, as executors, instituted the proceedings to obtain probate of the will and codicil. The case was tried before Gibson, J. (sitting for the President of the Probate and Matrimonial Division), and a special jury of the city of Dublin.

The Attorney-General, *O'Shaughnessy*, *Q.C.*, *Bushe*, *Q.C.*, and *Hunt*, for the plaintiffs.

The Right Hon. John Atkinson, *Q.C.*, *Campbell*, *Q.C.*, and *Blood*, for the defendants, the Governors of the Adelaide hospital.

M'Laughlin, *Q.C.*, and *Day*, for the intervenients, the Governors of Mercer's hospital.

The case of the plaintiffs was opened by the Attorney-General. Mr. Bradley, solicitor, Mr. Piers White, Q.C., and the Rev. Chancellor Tisdall were examined in support of the case of the plaintiffs. At the conclusion of the evidence of the Rev. Chancellor Tisdall counsel on behalf of defendants and intervenients withdrew all further opposition to the proof of the codicil, the pleas of the defendants being withdrawn and all imputation on the

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character and professional and personal honour of Dr. Ormsby and Mr. Gibney.

Atkinson, Q.C., for the defendants, stated that he understood that costs would not be asked for against his clients by the plaintiffs.

The Attorney-General, on behalf of the plaintiffs, stated that they did not ask for costs against the defendants.

[GIBSON, J.: Do you wish to abandon your costs?]

No. Our costs should come out of the assets.

[GIBSON, J.: That is they are to be paid by the residuary legatees. It is not the practice of the Court to give costs in that way, where the residuary legatees would be affected and are not consenting parties. It would be an injustice in a case where there has been litigation against a will or codicil, which turns out to be unfounded, that the Court should cast the expense of that litigation on the residuary legatees, who have not impeached either the will or codicil.]

The Attorney-General: As executors, it was the duty of the plaintiffs to prove the will and codicil, and they are entitled to get the costs of doing so out of the assets. Under all the circumstances the case appears to have been a proper one for investigation.

[GIBSON, J.: As far as the evidence adduced before me it does not appear that there was any case whatever for disputing the codicil.]

Atkinson, Q.C.: The defendants at the initiation of their proceedings were in a very different position from that now presented to the Court. We are in a position to examine witnesses to show that we had a valid and reasonable case for inquiry. Counsel for the plaintiffs do not ask for costs against the defendants. They admit the case was a proper one for investigation. The Court will not therefore under the circumstances make an order giving the executors, against their wish, costs against the defendants.

[GIBSON, J.: As far as I am aware, in no case does the Court, on the consent of the litigants, direct that the residuary legatee should bear the costs, unless he is a consenting party, or where the

Court considers it a just and reasonable thing to do, under all the circumstances.]

Atkinson, Q.C.: Our position is this. After hearing the evidence which has been given on behalf of the executors we have no hope of successfully contesting the codicil, but we can show that the case was one calling for investigation and this has been admitted by counsel for the executors.

M'Laughlin, Q.C., for the intervenients, submitted that in a case where opposition to proof of a will or codicil was withdrawn, on the understanding that the parties propounding the will or codicil would not ask for costs against the opposing parties, the Court would, as of course, allow the plaintiffs propounding the will or codicil their costs out of the assets. He also argued that, even if that view were not acceded to by the Court in this case, the defendants and intervenients should be now allowed to examine witnesses to show that the opposition to the codicil had been reasonable and proper.

[GIBSON, J.: The difficulty, as I have said, is as to onerating the residuary legatees with the costs.]

Subsequently (after consultation with the President of the Division) Gibson, J., made an order for probate of the will and codicil, with costs against the defendants and intervenients.

The other circumstances of the case are stated in the judgment of GIBSON, J.

On June 18th, 1894, plaintiffs moved to vary the minutes of the judgment pronounced at the trial by GIBSON, J., by omitting therefrom the declaration that the Court declined to express any opinion as to the effect of the consent entered into between the parties, and providing that the costs of the plaintiffs should be paid by the defendants and intervenients. There was also a cross-motion on behalf of the defendants that costs should not be given to the plaintiffs against the defendants, inasmuch as the consent on the faith of which the defendants withdrew their pleas and charges was a waiver by the plaintiffs of all claim for costs against the defendants.

There was no separate notice served on behalf of the inter-

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venients, but they supported and adopted the course taken by the defendants and were represented on the hearing of the motions. The same counsel appeared on the hearing of the applications as at the trial. The arguments are sufficiently referred to in the judgment.

GIBSON, J. :—

June 23.

This case comes before me on a motion, dated June 12, on behalf of the plaintiffs to vary the judgment, which still remains in minutes, by omitting therefrom the declaration that the Court declined to express any opinion as to the effect of the consent entered into between the parties, and providing that the costs of the plaintiffs should be paid by the defendants and intervenients, the Court being of opinion, and deciding on the materials before it, that the opposition of the defendants and intervenients to the codicil was without reasonable ground.

There was also a cross-motion on behalf of the defendants, dated the following day, that costs should not be given to the plaintiffs against the defendants, inasmuch as the consent, on the faith of which the defendants withdrew their pleas and charges, was a waiver by the plaintiffs of all claims for costs. By arrangement between counsel, Mr. Atkinson, on behalf of the defendants, moved his motion first. The difficulty in the case has been occasioned by two circumstances: one, that the consent on which the question turns was intended to be a private and confidential document, and was accordingly, by the agreement of both parties, withheld from the Court until its decision as to the costs was pronounced; and the other, that it must be construed and applied with reference to a contingency not contemplated by either, that is the refusal of the Court to allow the plaintiffs' costs to come out of the estate, as it would have done if the defendants and intervenients had been relieved from liability to pay such costs.

It is hardly necessary to repeat the reasons which induced me to give costs against the defendants and intervenients. Acting for the President, I am bound to follow the practice of his Court. The residuary legatees who would have been the natural and obvious opponents of the codicil, if there had been any solid ground for contesting it, declined to challenge its validity.

Successful attack on the part of the hospitals was obviously unlikely from the peculiar position they occupied, and the litigation must have been conducted with full knowledge of the peril of costs. The Attorney-General opened a case of an unusually complete and conclusive character. After Mr. Bradley was examined, it was plain that there was no real hope of establishing the defences, and Mr. White's evidence placed the testator's capacity beyond doubt. Mr. Bradley's testimony was only an expansion of the case and instructions sent by him to Mr. Hunt; the script of directions taken down by Mr. Bradley from the testator's own lips agreed with the codicil; and with these documents before them long before the trial, the defendants could not set up any case of surprise. I cannot therefore agree in Mr. Atkinson's statement when withdrawing the pleas, that the opposition was instituted "under an entire misapprehension, as it now turns out from the evidence of Mr. Bradley, of the circumstances attending the execution of the document." No doubt the defendants might have examined witnesses to disprove all the plaintiffs' case, but from Mr. Atkinson's language it was clear that such opposition was hopeless.

At the close of Dr. Tisdall's evidence, Mr. Atkinson interposed, and in well-chosen and appropriate terms withrew the defendants' pleas and all imputation on the character and professional and personal honour of Dr. Ormsby and Mr. Gibney. He did not allude to the fact that for some reason or another the plaintiffs were paying £900 out of their own pockets, as the purchase-money of the settlement, which would have detracted from the authority and weight of his remarks. I had no idea then, or during the discussion that followed, that the plaintiffs were doing more than not pressing for their costs; it did not occur to me that they had bound themselves in any way not to take or levy costs, and the whole discussion proceeded on the basis that the Court was quite free to make an order as to costs against the defendants, if it thought right to do so. The Attorney-General did not ask for costs, as he said the case was a proper one for investigation, but he did not express any intention of releasing or abandoning any right he might have under any adjudication pronounced by the Court.

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After hearing the parties, as there was some question as to the practice raised, I conferred with the learned President in his chamber, and having had my impression as to what the practice of the Court was confirmed by him, I returned to Court and announced my decision that the defendants, who appeared to have no reasonable ground for opposing the codicil, must pay the plaintiffs' costs, which would otherwise come out of the fund coming to the residuary legatees. The latter were no parties to the litigation, they had decided there was no ground to resist the codicil, and avoided any hazard of costs.

Where the residuary legatees (if there is a residue) or other parties interested concur in a compromise there is no difficulty in carrying it out. But where by a consent it is sought to onerate parties not represented in the suit it is the duty of the Court to be vigilant in seeing that the absent are not wronged: *Gillooly* v. *Plunkett* (1). The Court must be satisfied before exonerating a defendant in a case like the present from costs that there was a tangible and reasonable justification for the litigation. Three conceivable courses only can be suggested for the Court to follow in dealing with costs in cases of compromise:—1, the Court may form its opinion of the reasonableness or unreasonableness of the opposition from the course of the trial, and the evidence actually given before the compromise is arrived at. This (so far as I can learn) is the normal practice of the Court; 2, the Court may refuse to make any specific adjudication. This course is attended with the inconvenience that persons objecting to the compromise, not knowing the opinion of the Court, may have to impeach it by a substantive suit or proceeding, with the disadvantage that the opinion of the Court which tried the case would be unknown; 3, or possibly in a certain class of case the Court might itself, though this would be contrary to the normal practice, inquire into the reasonableness of the opposition by calling witnesses or otherwise, which in many cases would be illusory, especially if the terms of the compromise (as here) were kept secret. Where as here) the plaintiffs proposed to produce a vast body of evidence to demonstrate the unfounded character of defendants' opposition, it

(1) 9 L. R. Ir. 335.

would be difficult for the Court (after a compromise had been arrived at) by allowing a witness or two to be examined for defendants without cross-examination, and without knowing the strength of the plaintiffs' case to approve of a settlement onerous to third parties as just and reasonable. Defendants' counsel argued that if the Court would only allow costs in cases where on the evidence, as it stood at the moment of compromise, the opposition appeared to be reasonable, the result would be that hopeless cases would be protracted on the chance of the defendants satisfying the Court that the contest was fair and legitimate. But where pleas of undue influence are pleaded, the defendants must take the risk, and it is for them to say whether they will gamble for costs by prolonging a trial when victory is hopeless.

After my decision was pronounced something took place between counsel, which I did not hear, but which, by common admission of the learned gentlemen engaged, was as follows:—

Mr. Atkinson asked the Attorney-General would his client levy the costs. The latter said they would. Mr. Atkinson replied that it was a distinct violation of the arrangement, and handed me up the memorandum which was as follows:—"*Ormsby* v. *Good.* Pleas of undue influence and others withdrawn. No costs asked for by plaintiffs against defendants; plaintiffs and their solicitors to pay the defendants £900 on foot of all costs." The document came on me by surprise, and I at once declined to express then any opinion as to its effect, which was not then argued on either side. It was manifest that the document was a very important one for the Court to have had before it in considering the question of costs. On the one hand, it tended to support the view that the defence was not unreasonable or groundless, but on the other it suggested inquiry why the plaintiffs out of their own money were willing to pay the defendants such a large sum for Mr. Atkinson's retractation and withdrawal of the defendants' opposition, and raised a suspicion of some personal and peculiar motive. The transaction was a very unusual one, but no doubt there was some sufficient reason for it—a reason which has not been disclosed, and as to which I am not called on to speculate whether the motive was private and personal or otherwise. Whatever may be the effect of this secret compact upon the rights and

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position of the parties *inter se*, it cannot, I think, be allowed any weight in modifying the decision of the Court upon the question whether party-and-party costs should fall upon the estate, *i.e.* the residuary legatees, or the parties. Both parties agreed that that point should be determined by the Court without knowledge of the terms of the secret bargain. Now that their expectation has been disappointed and that the idea might occur that the contract might have aided their contention, the Court cannot recede from its decision or allow a new case to be made relying on the consent, though I by no means say that the consent would have altered my decision without much further investigation and disclosure of its motive and object than the Court now possesses. I cannot therefore assent to the suggestion of the Attorney-General that I should reconsider this part of the case, though, no doubt, I would have jurisdiction to do so.

The question, therefore, to be now decided is reduced to this :— It being determined that the party-and-party costs are not to come out of the estate, on which of the parties is the loss of such party-and-party costs now to fall?

Seeing the importance and difficulty of the questions arising on the consent, so unexpectedly brought to the notice of the Court, I directed that the parties should have an opportunity of inspecting the minutes of judgment, and the result has been the present motions. It is of course settled law that, since the Judicature Act as well as before, a Judge can reconsider his decision until the order has been drawn up.

No authority was cited on either side. On behalf of the defendants and intervenients, it is argued that the defendants were to get £900 net on foot of all costs without any deduction; that the necessary implication was that the plaintiffs, who were paying costs to the defendants, were waiving costs against them; and that the phrase "no costs asked for" must be construed as equivalent to an absolute foregoing of costs against the defendants. The Attorney-General disputed this construction, and also advanced some technical arguments which require examination.

First, he argued that it was an express condition of the compromise, though not stated in the written consent, that the terms of the consent should be secret and confidential, and that the con-

dition having been violated the consent became a nullity. Mr. Atkinson admitted that it was a term of the compromise that the consent should be regarded as confidential, but disputed that it was a condition precedent. He contended that the Attorney-General having stated that costs would be levied against the defendants the seal of confidence was removed. Very properly neither party suggested any recourse to affidavits, and the margin of difference between counsel is very trifling. I have no doubt that, if the consent was a release of costs, counsel was at liberty to bring it before the Court, if it had jurisdiction, when he was informed that the plaintiffs intended to levy the costs awarded. If the document was never under any circumstances to be disclosed, it would be useless. If the plaintiffs refused to pay the £900, no action could be successfully brought without declaring on and proving the written memorandum. A contract which would cease to bind the moment it was sued on would not be a contract at all.

A second argument presents more difficulty. By mutual agreement, the consent was withheld from the Court till the adjudication on the question of costs as between the estate and the parties was pronounced. The consent is, therefore, it is said, a collateral contract, which must be interpreted and enforced in a subsequent independent proceeding *inter partes*, and this Court has no jurisdiction now to do so.

I think, however, that, as between the parties, now that the consent is known to the Court, it ought not to make any award of costs contrary to the letter or spirit of the terms of the consent. Even if the judgment had been drawn up, the Court would have had jurisdiction to stay execution on equitable grounds if the consent was according to its true construction a release of costs: *Hughes* v. *Metropolitan Railway Company* (1). While the order rests in minutes the Court has of course a still wider power, and can exercise its discretion.

After very careful consideration, I have come to the conclusion that the necessary effect of the consent, whether the plaintiffs intended it or not, was as between the plaintiffs and defendants to discharge the latter from any obligation to pay the plaintiffs' costs, and that, even if this was not its strict legal construction, it would

(1) 2 App. Cas. 439.

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be inequitable and contrary to the honour of the transaction to make the defendants pay the plaintiffs' costs when the plaintiffs expressly undertook that they would pay £900 for the defendants' costs.

The result is that, as the estate is not to pay party-and-party costs, such costs will, contrary to their expectation, be borne by the plaintiffs, who unfortunately entered into a compact by which the Court is now of opinion that their right to costs is forfeited. The decision wears a certain air of hardship. Neither party dreamt that the Court would decline to fall in with the suggestion of counsel, or that there was any risk of having to forego, or to pay, party-and-party costs. The contingency was not contemplated, and a decision imposing the loss of these costs on either plaintiffs or defendants must be an unpleasant surprise. But though I sympathise with the plaintiffs, I have to point out that their position largely results from their own action. Compromises often give rise to misunderstanding and dispute, especially where embodied in secret compacts like the present, not intended to be brought to the knowledge of the Court. Though, however, the plaintiffs lose their party-and-party costs, their right to solicitor and client costs, over and above such costs, will be provided for by the order.

The following is the Order (so far as material) made by the Court:—

> "THE COURT being of opinion, and deciding upon the materials before it, that the defendants' and intervenients' opposition to the said codicil was without reasonable ground, and that but for the consent hereinafter mentioned the defendants and intervenients ought to pay the plaintiffs' costs, which ought not, in the opinion of the Court, to be borne by the estate; but having regard to a consent in writing entered into between the parties on the 5th day of June, 1894, without the knowledge and approval of the Court, costs ought not to be awarded against the said defendants and intervenients, did order that the plaintiffs should abide their own costs as between party and party, ... and did order that the plaintiffs and defendants should respectively abide their own costs of their respective motions, dated June 12th and 13th respectively, to vary the minutes of the judgment."

Solicitors for the plaintiffs: *Bradley & Son.*

Solicitors for the defendants: *Goodbody & Tisdall.*

Solicitor for the intervenients: *T. Falls.* R. W. L.

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1894.
June 20, 30.

Marriage settlement—Construction—"Issue" includes all descendants—Children and grandchildren taking per capita.

The word "issue" occurring in a marriage settlement *prima facie* includes all descendants, and in the absence of some controlling or explanatory context is not to be restricted to children only.

Dixon's Trusts (I. R. 4 Eq. 1) and *Denis' Trusts* (I. R. 10 Eq. 81) considered. Observations of Christian, L.J., in *Dixon's Trusts* considered and dissented from.

MOTION.

By indenture of settlement executed on the marriage of Doctor Robert Hobbs with Lydia Elizabeth Holburd, dated 13th June, 1834, and made between Robert Hobbs of the first part, Lydia Elizabeth Holburd of the second part, and the trustees (therein named) of the third part, after reciting that Lydia Elizabeth Holburd was entitled to the sum of £1000, secured by the bond of her uncle Theobald Roberts, it was recited that for the purposes of securing a jointure and maintenance for Lydia Elizabeth Holburd, in case she should survive her intended husband, it had been agreed that all her right and interest in the sum of £1000 should be vested in the trustees, upon the trusts and purposes thereinafter expressed concerning the same, viz. in the first place, to permit and suffer Lydia Elizabeth Holburd to receive and take the interest arising from the principal sum of £1000, till the solemnization of the intended marriage, and after the solemnization thereof to permit and suffer Lydia Elizabeth Holburd to receive and take the interest yearly arising from said principal sum of £1000 for her sole and separate use, free from and not subject to the control of the said Robert Hobbs, it being the true intent and meaning of the presents and of the parties thereto that the said Lydia Elizabeth Holburd should have the sole and exclusive right and power of receiving and passing receipts for the interest

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arising from said principal sum of £1000, notwithstanding her coverture, and that the said sum of £1000 and all interest arising therefrom should be thereby vested in the said trustees for the sole and exclusive benefit of the said Lydia Elizabeth Holburd. The indenture then witnessed that in pursuance of said agreement and in consideration of said intended marriage, the said Lydia Elizabeth Holburd (with the consent of the said Robert Hobbs) did thereby assign unto the said trustees, their executors, administrators, and assigns, the said principal sum of £1000 and the bond or security on which the same stood or thereafter might stand invested or secured, upon trust that the said trustees should pay the interest on said sum to the said Lydia Elizabeth Holburd during her life, free from the control or debts of the said Robert Hobbs, "it being the true intent and meaning of these presents and of the parties hereto that the said Lydia Elizabeth Holburd shall have the sole and exclusive right and power of receiving and passing receipts for the interest arising out of the said principal sum of £1000 sterling and the full power of disposing of said principal sum of £1000 sterling by deed or instrument in writing duly executed by her, and properly attested, or by her last will and testament, provided there shall be no issue, male or female, of said intended marriage; but if there should be issue, either male or female, of said intended marriage at the time of the death of the said Lydia Elizabeth Holburd, then the said principal sum of £1000 is to be divided share and share alike amongst the issue of said intended marriage, whether male or female, living at the time of the death of the said Lydia Elizabeth Holburd, although the said Robert Hobbs her intended husband should be then living."

The settlement contained no power for the appointment of new trustees, and a cause petition under the Court of Chancery Regulation Act, 1850, was filed on 20th December, 1851, against the trustees and William Tuthill and Edward Tuthill, as respondents, for the recovery of the principal sum of £1000 under the circumstances therein stated, and also for the removal of the two trustees of the settlement from the trusteeship and for the appointment of new trustees.

A decretal order was made on 12th May, 1852, by the then Lord Chancellor, whereby it was ordered that the two trustees, who were respondents, should be removed from being trustees of the settlement, and that a sum of money (therein named) should be invested in Government stock, and transferred to the credit of the matter. There were several other orders made in the matter which are not material. Lydia Elizabeth Hobbs (formerly Holburd), died 13th October, 1893, leaving six children, issue of her marriage with Dr. Robert Hobbs, surviving her. At the date of the death of Mrs. Hobbs there were also eight grandchildren living, being issue of the respective marriages of two of the daughters of Dr. and Mrs. Hobbs.

Previous to 1894 all the respondents in the matter had died, and on March 14th of that year an order was made for the continuation and prosecution of the proceedings in the name of Charlotte M'Alpine, otherwise Hobbs, and others, as petitioners, and Robert M'Alpine and the other grandchildren of Dr. and Mrs. Hobbs as respondents.

In 1894 the trust fund was represented by a sum of £973 9*s.* 11*d.*, New Consols, and a sum of £25 18*s.* 6*d.* cash, standing to the credit of the matter. On 12th June, 1894, an application was made to the Master of the Rolls on behalf of the six surviving children of the marriage of Dr. and Mrs. Hobbs, for an order that they should be declared entitled in equal shares to the funds and securities which represented the trust funds of the indenture of marriage settlement dated 13th June, 1834, executed upon the marriage of the said Robert Hobbs and Lydia Elizabeth Hobbs, then Holburd.

C. Brady, in support of the application :—

This case raises in the most definite way the meaning of the word "issue" in a marriage settlement. In *Warren's Trusts* (1) "issue" was construed in the more technical sense, and held to extend to remoter descendants than children ; but the Irish cases were not cited before Pearson, J., who decided the case. As regards this country *Dixon's Trusts* (2) is conclusive that the words

(1) 26 Ch. Div. 208. (2) Ir. R. 4 Eq. 1.

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"issue of intended marriage" used in a settlement made on the occasion of a marriage, when there is no indication in the context that they are meant to include remoter descendants, are to be construed as referring to the children of the marriage. As a rule "issue" in a mariage settlement is restricted to the *children* of the husband and wife: see judgment of Christian, L. J., in *Dixon's Trusts* (1). *Dixon's Trusts* (1) was followed by Sullivan, M.R., in *Denis' Trusts* (2). As to *Howard's Trusts* (3), the Master of the Rolls in *Denis' Trusts* (2) declines to follow it in preference to the *dictum* of Christian, L.J., of which he himself approves. In *Denis' Trusts* (2) Sir E. Sullivan points out that the particular question was not argued in *Howard's Trusts* (3), and that there was in that case ground for holding on the face of the settlement itself that "issue" included all descendants: *Donoghue* v. *Brooke* (4). In *Leigh* v. *Norbury* (5) it was manifest that "issue" could not be restricted to children only.

"Issue of the intended marriage," as used in this settlement, shows that only the immediate descendants of the husband and wife were intended. The question is one of intention, and the plain intention of the settlement should not be defeated by a technical rule. The children of Dr. and Mrs. Hobbs who are now living are therefore entitled to the whole fund in equal shares, and the grandchildren are excluded from participation in it.

Price, Q.C., for the grandchildren of Dr. and Mrs. Hobbs: —

The word "issue" may be restricted to children if it appears that it was intended to be used in that sense only, but its proper meaning is "descendants." In this particular settlement the term is not confined to children, but includes the issue of the marriage generally. There is no context showing that the meaning is to be restricted. There is no help afforded by any recital contained in the instrument, the only recital being one of an intention to provide for the wife. And where the term "issue" or "issue of

(1) Ir. R. 4 Eq. 1, at p. 11.
(2) Ir. R. 10 Eq. 81.
(3) 7 Ir. Ch. R. 344.
(4) Ir. R. 9 Eq. 489.
(5) 13 Ves. 340.

intended marriage" is used without any indication of intention in the deed that it should be restricted to the children only, it includes all descendants: *Leigh* v. *Norbury* (1); Elphinstone on Deeds, p. 323; Jarman on Wills (5th Ed.) 946.

In *Dixon's Trusts* (2) Christian, L.J., does not purport to lay down any positive canon of construction in reference to all cases. The observations in his judgment, which have been relied on, do not form the ground of the decision. There were other sufficient grounds to enable the Court to arrive at the conclusion they did. The context of the instrument in *Dixon's Trusts* (2) showed that children only were pointed at. The passage relied on by Mr. Brady in the judgment of the Lord Justice is nothing more than a *dictum* unnecessary for the decision of the case. The observations are to be construed as applicable only to the particular case before the Court. See the remarks of Lord Halsbury in *Jodrell* v. *Seale* (3) at p. 605.

In *Denis' Trusts* (4) there was quite sufficient in the context to enable the Court to interpret "issue" as "children." In *Biron's Contract* (5) there were indications all through the settlement that "issue" was intended to mean children. The case does not satisfactorily explain *In re Howard's Trusts* (6). *Meade's Trusts* (7) only decides that the term "issue" has the restricted meaning in the particular settlement in question. *Handcock's Trusts* (8) was a decision of the Vice-Chancellor, following the *dictum* of Christian, L.J., in *Dixon's Trusts* (2), contrary to his own opinion. There is no decision of the Court of Appeal in the case on the meaning of the word "issue"; the appeal was only on a question of election. Even on the Irish authorities there is no such rule as is here contended for by Mr. Brady. *Warren's Trusts* (9), which is the most recent English authority on the subject, is conclusive that "issue" in a marriage settlement or other deed *prima facie* includes all descendants, and is not restricted to children. In this settlement there is nothing to restrict the ordinary meaning of the

(1) 13 Ves. 340.
(2) Ir. R. 4 Eq. 1.
(3) 44 Ch. Div. 590.
(4) Ir. R. 10 Eq. 81.
(5) 1 L. R. Ir. 258.
(6) 7 Ir. Ch. R. 344.
(7) 7 L. R. Ir. 51.
(8) 23 L. R. Ir. 34.
(9) 26 Ch. Div. 208.

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word. The grandchildren are therefore entitled to share in the fund in question, and take *per capita*.

June 30.

THE MASTER OF THE ROLLS:—

This case raises in a more definite and simple mode than any reported authority the meaning of the word "issue" when occurring in a deed. This was most fairly and precisely stated by Mr. Brady in his very candid argument for the applicants.

By indenture of marriage settlement, dated the 13th June, 1834, a sum of £1000 the property of the intended wife, was assigned to trustees upon the occasion of the marriage of Dr. Robert Hobbs with Miss Lydia Elizabeth Holburd, upon trust that the said trustees should pay the interest on the said sum to the said Lydia Elizabeth Holburd during her life, free from the control or debts of the said Robert Hobbs, it being declared to be the true meaning of the settlement that Lydia Elizabeth Holburd should have the sole and exclusive right and power to pass receipts for the interest arising out of the principal sum, and should have power of disposing of the principal sum by deed or instrument in writing, provided there should be no issue of the intended marriage at the time of the death of the said Elizabeth Holburd; but if there should be issue, either male or female, of the intended marriage at the time of the death of Lydia Elizabeth Holburd, then the said principal sum of £1000 was to be divided share and share alike amongst such issue of the said intended marriage living at the time of the decease of the said Lydia Elizabeth Holburd.

Lydia Elizabeth Hobbs (formerly Holburd) died the 13th October, 1893. There were seven children issue of the marriage. Two of them married and had issue, all of whom were living at the death of Lydia Elizabeth Hobbs, and are still living. All these grandchildren are infants under twenty-one and reside in Canada. One of the children of Lydia Elizabeth Hobbs died during her lifetime.

It is unnecessary to trace the history of the fund which now stands to the credit of this old cause, and to which either the children of Mrs. Hobbs, or her children and grandchildren living at her death are now entitled. The sole question is whether by issue is meant children or children and remoter issue? Of

course there is no doubt that *prima facie* in either a deed or a will the word "issue" includes all descendants. Every case and every book recognises this, and it is in terms admitted in both *Dixon's Trusts* (1) and *Denis' Trusts* (2) to which I shall have to refer presently. This construction, however, easily yields to an explanatory context; as when "parent" is used as a correlative term; or when the "issue of issue" are spoken of. In these cases the word will be held to mean children. In the case before me nothing of the sort occurs. The words "whether male or female" are applicable to grandchildren as well as to children, and therefore prove nothing, and grandchildren, if issue, must also be in one sense or another issue of the marriage; and there is really nothing else in the language of the deed to affect the question. If it is difficult to suppose that a settlor would wish to provide equally for grandchildren and for his own children, *per capita*, it is equally difficult to suppose that he would desire to exclude grandchildren altogether, their parents being dead, whether he had or had not children to take under the trust; and it is to be remarked that this singular instrument contains no power of appointment, selection, or distribution whatever.

It is argued, however, that although this would go to show that, if construed in England, the word "issue" in this settlement would be held to include all descendants, a different rule prevails in the Courts in Ireland, because it is a marriage settlement, and the Irish cases show that in such instruments the word "issue" in Ireland is used in the restricted sense. Admittedly no such distinction exists in England. It is said to be founded upon Irish cases and these alone, and to be contrary to the English decisions, such as *Warren's Trusts* (3).

The Irish cases in question are *Dixon's Trusts* (1); *Denis' Trusts* (2); and *Donoghue* v. *Brooke* (4). In *Dixon's Trusts* (1) is to be found the origin of the alleged peculiar Irish construction. There the settlement, which was post-nuptial, contained in itself clear indication that the word "issue" meant children.

The judgment of the Lord Chancellor, which is a very clear and able criticism of the deed and the principles of law which

(1) Ir. R. 4 Eq. 1.
(2) Ir. R. 10 Eq. 81.
(3) 26 Ch. Div. 208.
(4) Ir. R. 9 Eq. 489.

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ought to be applied to its interpretation proceeds upon the grounds that the words "present and future issue" (there being a child of the marriage in existence at the time) coupled with the gift over in the event of "the issue of the said marriage happening to die unmarried, or being married, *dying without leaving issue in the lifetime*" of the settlor, pointed conclusively to the narrower construction of the word "issue," as equivalent to children: and that when a word of doubtful import is used in one particular sense in part of a legal instrument the same sense ought to be placed upon it in other parts of the same instrument unless the context shows that this ought not to be done. This was a clear and sufficient ground for deciding the case then before the Court; and the Lord Chancellor never adverts to any principle of general application different from the well-understood rules of construction recognised in all the cases.

Lord Justice Christian adopts the same construction, and gives reasons for it identical with those expressed by the Lord Chancellor (p. 14). It was therefore unnecessary to go further. On the face of the settlement itself there was in the opinion of both learned judges proof that the word issue in it meant children, and did not include remoter descendants. Nothing more was wanted for the decision of the case. But the Lord Justice went further, and used language which seemed like laying down for the first time a general rule, that in marriage settlements (including post-nuptial settlements) the word "issue" is to be construed in the narrower sense, unless the contrary appears: that is, that in such instruments, the *prima facie* meaning of the word "issue" is children, and not all descendants, on account of the object and presumed intention of the parties and the matter in hand. He says, p. 12.:—"But the reverse is the case when the instrument is a marriage settlement (which the recitals in this deed show that though executed after marriage, it was in effect); for there the occasion itself, the very business in hand, suggests that 'issue' is used as a synonym for children. Why? Because the proper objects of a marriage settlement are the children of the intended marriage. Grandchildren or great-grandchildren are never thought of on such occasions, as objects of independent provision; portions are provided for the children, and *they* are thereby enabled, when

their own turn comes to be married, to make provision for *their* children. But issue more remote than children are rarely, if ever, *directly* within the scope of a marriage treaty; and therefore it is that, in dealing with such an instrument, the very occasion suggests that if 'issue' be the word used, it is meant in the sense to which it so easily lends itself of 'children.' Thus the very nature of the instrument helps to construe the word."

In *Denis' Trusts* (1) the funds put in settlement were partly real and partly personal property. The words there were "in case there shall be issue of said intended marriage, in trust for and for the use and benefit of such issue in such manner, share and proportion, and under and subject to such limitations as the said William Denis shall by any deed or instrument in writing, or by his last will and testament duly executed, direct, limit, or appoint, and for want of such direction or appointment to be divided among such issue share and share alike; but in case there shall be no issue of said intended marriage, or if issue, in case all such issue shall die before attaining their age of twenty-one years or days of marriage, in trust and for the use and benefit of the said William Denis, his heirs and assigns, for ever." The words which are added to the designation of issue, viz. issue "*of the intended marriage*" could hardly be meant in this context to apply to remoter descendants, who, although "issue" of the husband and wife, could scarcely be said to be "issue" of the intended marriage, being further restricted to such issue, as *shall attain the age of twenty-one years*. These expressions could not be meant to apply to issue however remote which should attain twenty-one years; at least that would not be their *prima facie* signification, and might, unless restrained by the context, tend to transgress the rule against perpetuities. There was as I have said real estate in that case put into settlement. There is no such circumstance here, and I only refer to the fact that there the limitation was one as regards real estate. That case, however, though distinguishable from the present by the addition of the words "who shall attain the age of twenty-one years" was undoubtedly decided by the Master of the Rolls on the ground that

(1) Ir. R. 10 Eq. 81.

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Christian, L.J., had in *Dixon's Trusts* (1) laid down the correct rule of interpretation applicable to the case of marriage settlements, reversing the canon as to the *prima facie* meaning of "issue."

In *Donoghue* v. *Brooke* (2) the same judge had previously recognised the rule, as stated by Christian, L.J., in *Dixon's Trusts*, though the case before him clearly excluded it, the context showing very plainly that the word issue was there used in its widest sense as including all descendants.

So the matter stands as to the Irish authorities. In no other case that I am aware of has the *dictum* of Christian, L.J., been unreservedly adopted, and in some Irish cases it has been spoken of with doubt, or, at least, with reservation, though never expressly dissented from.

On the other hand it has never been acted on in any English case; and in *Warren's Trusts* (3) the rule is stated by Pearson, J., in conformity with the older authorities. He says at p. 215:— "The question is as to the meaning of the word 'issue' in the power of appointment, *i.e.* whether the husband or the wife had a power of appointment to the issue of the marriage generally, or only a power of appointing to the children of the marriage; in other words, whether the power is to be confined to the children of the marriage. Stopping at the power of appointment, and remembering that the instrument is a deed, not articles for a settlement, but the settlement itself, I think no one could have any doubt that in accordance with the ordinary rule of law, the word 'issue' must be construed in its largest sense. To read it in that sense would lead to no inconsistency, and would be in no way contrary to the ordinary form of a marriage settlement. According to my experience, nothing is more common in a marriage settlement than a power enabling the husband and wife to appoint to issue of the marriage remoter than children, if born within the proper limit of time. And such a power is valid, even if this limit of time is not expressed in it, provided that the exercise of it is confined within the proper limit. Having come to the conclusion that there would be nothing irrational in so construing the word 'issue' in the power, and that this construction

(1) Ir. R. 4 Eq. 1. (2) Ir. R. 9 Eq. 489. (3) 26 Ch. Div. 208.

is in accordance with the intention of the parties, I must hold that, stopping at the power, the word 'issue' means 'issue' generally. The settlement is very badly drawn, and there can be no doubt that the limitations over in the event of the husband's bankruptcy are invalid. But for the purpose of ascertaining the meaning of the word 'issue' I must treat those limitations as if they were valid. Among them there is a direction to the trustees to apply the income of the trust funds, after the death of the wife leaving issue of the marriage, for the maintenance and education of such issue during the life of the husband. It might very well happen that in that event there might be no issue but grandchildren or great-grandchildren living, and in such a case this direction would be inoperative if 'issue' did not include grandchildren and great-grandchildren. Looking at the intention of the parties, and considering the reasonableness of such a construction, I should, if I were to stop at the power of appointment, come to the conclusion that the word 'issue' ought to be construed in its widest and strictly technical meaning. But it is said that in the subsequent provisions of the settlement there are expressions used which show that the word 'issue' is intended there to be restricted to children, and that therefore I ought to construe it in the same way in the earlier clause. I cannot see any necessity for so doing. It may well be that it was intended that only children of the marriage should take under the trust in default of appointment, but that a wider discretion should be given to the husband and wife by the power of appointment. I cannot see any *a priori* necessity for restricting the meaning of the word 'issue' in the power of appointment, merely because that word can only mean 'children' in the trust in default of appointment. It is almost impossible to put a sensible construction on some of the clauses of the trust in default of appointment, and I am glad that I am not called on to do so. Reference has been made to the clauses which provide for the settlement of future property of the wife. But I think it would be impossible to draw any analogy from the use of the word 'issue' in those clauses, because in them the issue of the wife by the intended or any other marriage is referred to. This instrument being, as I have already said, a deed—not merely articles for a settlement—I can

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see no reason why I should construe the word 'issue' in the power of appointment as meaning only children of the marriage. By construing it to mean descendants generally, I do not think that I am adopting two inconsistent interpretations: on the contrary, I think the result is to make the settlement, as a whole, a rational one. Am I then bound by authority to construe the word 'issue' in the former clause, as meaning 'children' only, merely because I find that it is expressly restricted to children in the latter clause? I think I am not. I think I am bound to look at the whole of the deed, and if I find that it was not intended to restrict the meaning of the word in the earlier clause, I must give the word in that clause its proper unrestricted meaning. I am not bound to restrict the meaning, unless there would otherwise be a manifest inconsistency or I should be defeating the plain intention of the parties." No doubt the later Irish cases were not cited.

Thompson v. *Simpson* (1) relied on in *Warren's Trusts* (2) for the narrower construction was the case of articles; and the word "issue" was connected with a context proving that it meant children (born in the lifetime of the husband, or *within due time after his death*). As an index of professional opinion on the question, I may point out that *Dixon's Trusts* (3) is referred to with obvious disapproval by Mr. Farwell, in his work on Powers, p. 496, and also in Elphinstone on Deeds, p. 323.

The question therefore is whether I ought to follow the rule acted on in *Denis' Trusts* (4), avowedly decided on what was said in *Dixon's Trusts* (3), or adhere to the old established general rule, as recognised and applied in all the previous, and in the subsequent English cases?

If I felt that *Denis' Trusts* (4) was a binding authority on the very point before me, I should of course follow it even against my own opinion; but I do not think it is. A gift to issue on attaining twenty-one years *may* point to children alone; because the wider construction might violate the rule against perpetuities. No such difficulty can arise here, as I have already shown. The cases at any rate are not identical. I am therefore free to accept or

(1) 1 Dr. & War. 459.
(2) 26 Ch. Div. 208.
(3) Ir. R. 4 Eq. 1.
(4) Ir. R. 10 Eq. 81.

reject the reasons for the decision; and to do either, those reasons must be examined. Was the argument of Christian, L.J., in *Dixon's Trusts* (1) well founded?

It will be seen that it depends on the accuracy or inaccuracy of one statement, viz. (p. 12):—"Because the proper objects of a marriage settlement are the children of the intended marriage. Grandchildren or great-grandchildren are never thought of on such occasions as objects of independent provision; portions are provided for the children, and *they* are thereby enabled, when their own turn comes to be married, to make provision for *their* children. But issue more remote than children are rarely, if ever, directly within the scope of a marriage treaty, and therefore it is that, in dealing with such an instrument, the very occasion suggests that if 'issue' be the word used, it is meant in the sense, to which it so easily lends itself, of 'children.' Thus the very nature of the instrument helps to construe the word."

This is the key-note of the whole argument. I need not say that in venturing to differ on any point from the deliberate opinion of so great a Judge as Lord Justice Christian, especially when that opinion has been adopted by Sir Edward Sullivan, I do so with the utmost diffidence. But the passage I have quoted is not so much the enunciation of a principle of law, as the statement of a matter of fact and common experience; and with great respect I venture to question its accuracy. Of course neither Christian, L.J., nor Sullivan, M.R., purported to lay down any special rule applicable to Irish cases and not to English. There is no different practice amongst Irish conveyancers nor is there any different view or object present to the minds of Irish parents or other settlors in providing for the interests of young persons about to enter into the estate of matrimony from those which prevail in England. We use, as a rule, the same conveyancing precedents in this country as in England. The English text-books are our text-books. The usages of English conveyancers are our usages; and though it is no doubt true that in framing a marriage settlement, the children of the marriage are most directly in view, and the mind of the settlor may not in the first instance be projected

(1) Ir. R. 4 Eq. 1.

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so far forward into futurity as definitely to contemplate the case of grandchildren or remoter issue, yet when the contract assumes formal shape, it not only often, but almost always, does contain express provision for remoter issue in terms. This is the settled and established practice of conveyancers. Take Davidson's "Precedents in Conveyancing." In Vol. III. (Settlements) Part I., 142 (note *m*), he says:—"The word issue includes all descendants, though it may be restrained by the context to children only (see per Sir W. Grant in *Leigh* v. *Norbury* (1)); but stronger evidence of intent is necessary to control the primary meaning in deeds than in wills (*Marshall* v. *Baker* (2), where the word was held to mean children) except in the case of executory instruments such as marriage articles." In principle it makes no difference, whether the provision for remoter issue takes effect by a power to appoint or by direct gift, they are equally within the contemplation of the settlement.

The power to appoint the fund usually includes in its objects both children and remoter issue. No doubt the trust in default of appointment is usually confined to children: but then, it is made to vest at twenty-one or marriage; and in that case, *i.e.* in default of appointment, no doubt the observation of Christian, L.J., is borne out:—"Portions are provided for the children, and *they* are thereby enabled, when their own turn comes to be married, to make provision for *their* children." But the earlier portions of the sentence, viz.:—"grandchildren or great-grandchildren are *never thought of* on such occasions as objects of independent provision," is surely inaccurate; for they are expressly provided for under the power, and are certainly "thought of" and their interests protected one way or the other.

The same will be found to be the case in the precedents of Prideaux, and in Jarman and Bythewood, these being the books under the guidance of which the title-deeds of probably nine-tenths of the settled estates in England and Ireland have been framed.

If, then, in a formally drawn marriage settlement it is the universal, or all but universal, practice both here and in England to make provision in certain events for issue remoter than children,

(1) 13 Ves. 344. (2) 31 Beav. 608.

why should the word 'issue' be confined in an informally drawn settlement to its most limited import, so as to exclude remoter descendants? I think the ground-work of the reasoning fails.

It is true that in the present and in other cases this view, which gives to issue its normal meaning in settlements as well as in other assurances, may cause unexpected and *prima facie* improbable developments to follow: grandchildren taking equally with children, even with their own parents, *per capita*. A settlement, however, cannot be construed by the events which subsequently occur. Its meaning must be gathered from its language, as it would be interpreted immediately after its execution.

But the alternative construction would lead to results equally, or more, unexpected and incongruous. To restrict issue to children would lead to the result that if the married couple survived their children, but left grandchildren, however numerous, there would be no provision whatever for them—a result which could not possibly have been intended. The £1000 in this case would in that event have gone to the mother, who could then have settled it on a second marriage, or spent it without doing anything whatever for the issue of the marriage. It is no answer to this to say that she might have provided for grandchildren out of the fund if it became her absolute property. She might; but she might not. That is, the settlement would be no settlement for them.

I am of opinion, that in a case such as the present, where, admittedly, no light is thrown upon the question by any explanatory context, I am bound to give to the language used its ordinary and established import; and that in doing so the result follows that grandchildren are not excluded from the direct benefits conferred by this settlement; children and grandchildren are therefore entitled to the fund *per capita*.

Solicitor for the applicants: *F. Browne.*
Solicitor for the grandchildren: *A. F. Baker.*

R. W. L.

M. R.
1894.

Feb. 6, 10, 20.

Appeal.
June 5.

GREENE, Deceased; GREENE *v.* KIRKWOOD.

(1894. No. 18.)

Will—Condition in restraint of marriage—Gift over in the event of a daughter marrying beneath her.

A gift over of real estate in the event of the devisee marrying a man "beneath her in life, that is to say, below her in social position," is good.

Evidence having been taken as to the social position of the devisee and her husband at the time of the marriage, it was held that the gift over took effect.

Adjourned Summons.

This was an originating summons to take the opinion of the Court upon the construction of the will of the Rev. Godfrey Samuel Greene, deceased.

The will of the testator, dated 25th January, 1889, was as follows:—"The freehold land in my possession, known as the near and far White Hill, Peggy's Island, and the Madam's meadow, I leave and bequeath, share and share alike, to my two daughters unconditionally. My chattel property, consisting of money in house and bank, money lent on mortgage, and promissory notes, stock, crop, and farm implements, cars, carriages, and harness, household furniture, and all other chattel property whatsoever, I leave and bequeath to my wife unconditionally. The freehold land in possession of tenants I leave and bequeath for the term of her life to my wife, and after her death, share and share alike, for the term of their lives, to my two daughters, and to their issue, as they shall appoint, and failing issue of survivor, I leave and bequeath said freehold, share and share alike, to my two sons and to their issue, as they shall appoint; and I appoint my said wife and my two daughters my joint executors and residuary legatees." On 21st May, 1890, the testator executed the following codicil:—"If at any time my daughter Sarah shall marry a man beneath her in life, that is to say, a man below her in social position, I hereby revoke my will regarding her, and what

ought to have been her share I leave and bequeath, share and share alike, between my two sons; and if at any time my daughter Alice shall marry a man below her in life, that is to say, below her in social position, I hereby revoke my will regarding her, and what ought to have been hers, I leave and bequeath, share and share alike, to my said two sons."

The testator died on 9th June, 1893, leaving his wife and his two sons, Robert Saunders Greene and Godfrey George Greene, and his two daughters, Sarah and Alice, him surviving. On 28th September, 1891, his daughter Sarah married, without the knowledge of her family, William John Kirkwood, who was then an office apprentice in a mill. The marriage having become known after the testator's death, his two sons claimed the share of their sister Sarah under the will, on the ground that she had forfeited it by marrying W. J. Kirkwood, and instituted these proceedings against their sisters Sarah and Alice for a declaration to that effect.

The facts of the case as disclosed in the affidavits and in the evidence of W. J. Kirkwood and Sarah Kirkwood, who was examined in Court, are sufficiently stated in the judgment of the Master of the Rolls.

Ronan, *Q.C.*, and *Henry*, for the plaintiffs.

Kenny, *Q.C.*, and *Bates* for the defendant, Sarah Kirkwood.

The following authorities were referred to during the argument:—*Keily* v. *Monck* (1); *Egerton* v. *Brownlow* (2); *Clavering* v. *Ellison* (3); *Duggan* v. *Kelly* (4); *Fillingham* v. *Bromley* (5); *Bullock* v. *Bennett* (6); *Hodgson* v. *Halford* (7); *Jenner* v. *Turner* (8); *Viscount Exmouth* v. *Praed* (9); *Duddy* v. *Gresham* (10).

(1) 3 Ridg. P. C. 205.
(2) 4 H. L. Cas. 208.
(3) 3 Drew. 476; 7 H. L. Cas. 717.
(4) 10 Ir. Eq. R. 295.
(5) T. & R. 530.
(6) 7 De G. M. & G. 283.
(7) 11 Ch. Div. 959.
(8) 16 Ch. Div. 188.
(9) 23 Ch. Div. 158.
(10) 2 L. R. Ir. 442.

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Feb. 20.

THE MASTER OF THE ROLLS :—

[Having read the will and codicil, proceeded as follows :—]

The devisee, Sarah Barker Kirkwood, was unmarried at the date of the will, and also at that of the codicil. The will is dated the 25th January, 1889, the codicil, 21st May, 1890, and her marriage took place on the 28th September, 1891. The testator lived till the 9th June, 1893.

The first question then is, whether the marriage which took place in the testator's lifetime, though after the codicil, assuming it to be such a marriage as is aimed at in the instrument, can raise the question at all, since, for some purposes, a will or codicil dates from the death of the testator, and the codicil here speaks of the marriage as a future event ("shall at any time"). I am quite clear that it can, and does, raise the question, for it is only "with reference to the real and personal estate comprised in it," that, under the 24th section of the Wills Act, the will is to operate as if executed immediately before the death of the testator. Lord Justice Turner, in *Bullock* v. *Bennett* (1), says of these words :—"I understand this to mean, not with reference to the objects of the testator's bounty, who are to take the real and personal estate, but with reference to the real and personal estate which is to be taken by those objects." I had occasion recently to consider the authorities bearing on this question in *King's Trusts* (2), and there is no doubt about the law on this branch of the case. A marriage in the testator's lifetime, but after the date of the codicil, is within the terms of it. The point for decision is therefore narrowed to the construction and legal effect of the clause in question in relation to the actual marriage between Sarah Barker Greene and William John Kirkwood.

The words are, "if at any time my daughter Sarah shall marry a man beneath her in life, that is to say, a man below her in social position, I hereby revoke my will regarding her."

It is to be determined whether the condition introduced by this language is one to which the law will give effect, and if so whether the facts bring the marriage in question within the condition.

(1) 7 De G. M. & G. 283. (2) 29 L. R. Ir. 401.

There is little doubt but that the testator intended, or expected, the condition to operate as a condition subsequent, if at all; that is, to defeat a previously vested estate. He did not think that the event would happen in his lifetime, and the estate conferred by the will was immediate. In express terms, the event was to "revoke" the gift in the will, that is, to defeat it if it had vested. And it is now unnecessary to inquire how, if it had been a simple condition, it would have operated in the events which have happened, the divesting event having occurred before the estate could vest, and whether in that case it would have become a condition precedent, preventing the possibility of vesting, or whether, which is probably the correct view, the vesting and divesting would have both occurred in that order, but both in the same indivisible instant of time. This inquiry is unnecessary, since the event is not merely a condition, but by the terms of the codicil revokes the devise *ab initio*, where it happens in the testator's lifetime, and before any interest has been acquired.

Is such a condition illegal? It is to be borne in mind in considering this question that it arises in reference not to personal but to real estate, as to which the rules not of the civil but of the common law prevail. A condition connected with a devise of lands imposing a partial restraint upon marriage is not on that account invalid, certainly if accompanied by a gift over as here, and it can hardly be said that the condition here, is in any view equivalent to a total prohibition of marriage. *Keiley* v. *Monck* (1), to which I referred during the argument, is an authority that a restriction may be actually in total restraint of marriage, though not expressly or literally so; and that such a restriction would be invalid even as regards realty, or a fund produced by realty. The proviso there was "or in case my said married daughters, or any of them, shall intermarry with any person or persons, not being at the time of such intermarriage seised of an estate in fee, or of a freehold perpetual, of the clear yearly value of £500 sterling, over and above every charge and incumbrance that shall then affect the same, that then the said legacy hereby bequeathed to such daughter so offending shall be forfeited as to her and them." The Lord

(1) 3 Ridg. P. C. 205.

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Chancellor, Lord Clare, there says, at p. 261:—"I take the principle to be settled that the law allows reasonable restraints upon marriage; but that conditions prohibiting marriage, or leading to a probable prohibition of marriage, are condemned upon principles of sound and general policy." And again, at p. 262, he says: "But with respect to conditions subsequent the law is clearly settled, that if they are illegal the condition is rejected and the estate vests absolutely. How does the condition in restraint of marriage, which in my opinion is clearly subsequent, operate in this case? The respondent is forbidden to marry without the consent of Mr. Usher. So far the law allowed the testator to go, and that consent has been obtained. But in addition to this restraint she is forbidden to marry any man who has not a clear unincumbered estate in fee-simple or freehold perpetual of £500 yearly, over and above all deductions. The case reported in *Eq. abr.* is that a condition in restraint of marriage excluding a particular profession is void. How many particular professions are naturally excluded by that condition? What man of the profession of the law has set out with a clear unincumbered real estate of £500 a-year, or has acquired such an estate for years after entering into the profession? How many men of the other learned professions can come within this condition? It will in effect exclude ninety-nine men in one hundred of every profession, whether civil, military, or ecclesiastical. It in effect excludes nearly every mercantile man in the kingdom, for, let his *personal* estate be never so great, unless he is seised of a *real* estate of the ascertained description, he is excluded. Every man who has an estate in strict settlement in possession, let the value of it be ever so considerable is excluded. Every man who has an estate in remainder only, be the value what it may, is excluded. In a word, the condition which this weak old man would have imposed upon his daughters, as the price of their portions, does, to my judgment, clearly and unquestionably lead to a total prohibition of their marriage, and as such ought to be condemned in every Court of Justice." That case goes as far as any reported case.

But it cannot be said that a condition which leaves a person free to marry any one of the same social position as himself, or of superior station, is, in the case of people in the middle rank of life

at least, a total prohibition of marriage. No authority for such a proposition can be cited. I am, therefore, clearly of opinion that the condition is not void on the ground of public policy.

This part of the case was not argued for the defendant, and I daresay advisedly; because conditions not to marry a Papist (1), not to marry a Scotchman (2), nor to marry a person who had been a domestic servant (3), and the like, have been held good in reference to real estate; and even a condition not to marry anyone but a Jew (4) has been upheld.

The only other ground upon which it could be impeached, and it is the one which has caused me to postpone my decision in the case, would be that of uncertainty; for a condition may appear unwise or even frivolous; we may think of it as affording no adequate reason for the consequences to which it gives rise; it may seem ungenerous, unwise, harsh, even cruel, without being illegal. Is this condition, then, too uncertain to be given effect to?

This would be so if there were no mode of determining whether one person is or is not of lower social position than another. But such is not the fact, in all cases at any rate. There can be no doubt, for instance, that the social position of a peer is ordinarily superior to that of a commoner. In *Rishton* v. *Cobb* (5), Lord Cottenham, in speaking of a lady who, after the death of her first husband, Major-General Sir Niel Campbell, married a Mr. Rishton, about whom the reports in Mylne and Craig, and also in 9 Simon, 615, show nothing (in reference to *status*) but that he had no handle to his name, says:—"That the plaintiff, notwithstanding her marriage" (to Rishton) "continued to call herself Lady Campbell, was not in itself an assumption of a false character. That is so generally done, after a marriage with a second husband of inferior rank to the first, that no imputation of improper motives can be founded upon it."

Doubtless, many similar expressions could easily be found in the law books; and in the case which I have put there could be no difficulty in applying language such as that with which I

(1) *Duggan* v. *Kelly*, 10 Ir. Eq. R. 295; and cf. *Re Knox*, 23 L. R. I. 542.

(2) *Perrin* v. *Lyon*, 9 East, 170.

(3) *Jenner* v. *Turner*, 16 Ch. D. 188.

(4) *Hodgson* v. *Halford*, 11 Ch. D. 959.

(5) 5 My. & Cr. 150.

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have to deal. The difficulty arises where there is no definite criterion, such as that of hereditary or acquired rank to appeal to; though even then there are numbers of cases which might be suggested as instances in which there could be no real doubt in the matter. If the son of a country gentleman married the daughter of a costermonger or chimney-sweep—though she might be his superior in many or all the essential qualities of mind and character—no one would hesitate to say that he had married a person of "social position" inferior to his own; on the other hand, if the son of a costermonger married the daughter of a chimney sweep, it might be quite impossible to say whether such a condition did or did not apply. If that be so, the uncertainty is not in the condition, but in the application of it; and, doubtless, if the question arose in any case where the difficulty of determining whether there was or was not a real social disparity was so great as to leave it wholly doubtful, the leaning of any tribunal would be strongly against holding that the condition applied. In all these cases the question is, what meaning the world at large (as represented if necessary by a jury in a particular case) would place upon the expression, and how they would—or rather how they ought—to decide on the facts? I think, therefore, that the condition is not illegal, and is not in itself so doubtful that the Court can avoid considering whether it does or does not apply in a given case.

This brings me, therefore, to the facts concerning the relative social positions of those two persons, Sarah Barker Greene and William John Kirkwood. Miss Greene was the daughter of the testator, a beneficed clergyman of the Church of Ireland. His living, that of Tamlaght o'Crilly, was a small one, the stipend attached to it being some £210 per annum. Out of this, when his health failed, as it did for some four years before his death, he had to pay the salary of a curate. He had himself been curate of the same parish at a salary of £150 for some years before 1872, when he became rector, and in 1872 he received a sum of £1080 commutation money in respect of his curacy under the Irish Church Act. This money, with perhaps some of his savings, he had invested in the purchase of lands, some of which are the subject of this devise to Mrs. Kirkwood. The total

amount of income from these lands was somewhat over £120, besides which his wife had and has the income arising from £1000 bequeathed to her by an aunt, Mrs. Wray, the widow of the Rev. Henry Wray, who had been Vice-Provost of Trinity College, Dublin. Mr. and Mrs. Greene were cousins-german. They had started life on his curacy and a sum of £500 belonging to her, partly spent on his college training. Their means were not only adequate to the modest needs of a simple country life, but enabled them to save some money besides. Of their ancestry nothing appears, except that Mrs. Greene says:—"My husband's family occupied a most respectable position, and were regarded as of the gentry in the district in which they resided."

Mr. Greene was himself a graduate of Trinity College, Dublin. Mrs. Greene had six brothers, all graduates of the same University, and two sisters, who were married to clergymen of the Church of Ireland. Testator left four children him surviving, two sons and two daughters. Both his sons are Church clergymen. His other daughter is unmarried. A sacerdotal family, if ever there was one!

As regards the circle in which Mr. Greene and his family moved, all that I find is that they associated in an out-of-the-way district with any gentry who were there (and these were not many), on terms of social equality. Unless there be some personal stigma attaching to a clergyman of the Church of Ireland, this is what nearly always happens. There were not a great many persons who could be called "gentry" about Tamlaght o'Crilly or Kilrea. Mr. Greene and his household associated with those who were there as an equal.

The daughters of the family occupied themselves with parish work, in helping the poor women in the neighbourhood to earn something by embroidery, and joining in the work themselves, not for gain, but to help the poor, any money they made being given away in charity. No doubt the young ladies assisted in many ways about the home; but they were young ladies, and the appearance and manner of Mrs. Kirkwood, who was examined in Court, left no doubt upon my mind as to this point. The family was one of some refinement, none the less so because its members were necessarily thrown much into the society of poor and uneducated

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parishioners, amongst whom their lives were largely passed, or because they were not rich people, and were not above doing any useful work which came in the way of their daily duty.

Now what was the social position of William John Kirkwood at the date of his marriage? He was then aged about twenty-seven or twenty-eight years, and was employed as an office apprentice in a mill, or perhaps as assistant cashier, receiving 17*s.* 6*d.* a week and his dinner. Of course on such wages he could not have kept a home suitable to his wife's position. His father was, and is, a small farmer—a very small one—holding under Mr. (and now under Mrs.) Greene, seven acres of land, at a rent of £6 10*s.*, besides about six acres, which he has purchased from the Church Temporalities Commissioners, I presume on the usual instalment system, though this does not appear. He has two other children, David Kirkwood, a trained National school teacher, and Mary Anne Kelso, widow of a labourer who was employed by the Rev. Mr. Greene at 9*s.* a-week, out of which he paid 1*s.* a week for the occupation of Mr. Greene's gate-lodge. Her children have been provided for since his death by the Presbyterian Orphan Society.

Against the respectability of these persons not a word has been said. They appear, so far as I can see, to be one and all well-doing and deserving, most meritorious in conduct, and entitled to as much respect as the highest in the land. That is, however, not the question. The question is, were they, or rather was William J. Kirkwood, on the 28th September, 1891, in a social position equal to that of Miss Greene?

In considering this question, I am asked to take into account the prospects of social advancement possessed by a steady young man in Kirkwood's position, and that is most reasonable. He has actually advanced in life since, and is now assistant book-keeper in the Bedford Company in Belfast, receiving a salary of £10 a month, and he has of course his chances of still further advancement. But the point is, what was his position, taking his prospects into account, at the time of his marriage, and not what it is now, or may be hereafter. It is impossible to entirely exclude from view what he had been before, and on this point there is a good deal of evidence before me, and it satisfies me beyond all doubt that not only was he never at any moment of

time on a footing of social intimacy much less equality with the family of the Greenes, but that he was always treated in the most distinct manner, and indeed treated himself, as their undoubted inferior. He had for many years been taught music by his future wife in her father's house. But this was looked upon by all the rest of the family at any rate as a mere kindness, perhaps a condescension, given to a boy of some musical taste, because he sang in the choir in church, and to enable him to play the harmonium on an emergency. Even this approach to social recognition was not relished by the father of the young lady, and he ultimately forbade it. Never on any single occasion during all these years did he eat a meal at the table of the rector and his family. He called them "Sir," "Ma'am," and "Miss," as was natural from one in his situation, and never dreamt of such familiarity as is involved in being allowed to shake hands with them. That he had opportunities of becoming intimate with the young lady the sequel shows. He and his wife say that on one occasion he was invited to accompany the family to Portstewart, a seaside place, where they went for a month, and stayed there on the footing (as I understand their case) of a guest. Both he and she were examined before me. I have not a shadow of doubt that he was taken there as a servant boy to look after the pony, and drive it back and forward from Tamlaght o'Crilly on Saturdays and Mondays, and groom it, and look after the vehicle in the interval, and that he had his meals invariably in the kitchen with the two workhouse girls who were the servants. He said he was in the sitting-room every evening, but to me he admitted that he was brought there for family prayers (as no doubt all the servants were), although he did say he remained for "amusements." What these were I do not know, and none of the family tells us a word about this. In his relations to the testator and his family (other than the young lady he afterwards married), he was looked upon by them as a menial, and treated as such, kindly and indulgently no doubt, but still as a servant.

How did he regard himself? I need not go into the question whether his sister, Mrs. Kelso, was looked on as a common washerwoman by Miss Greene. I think the fairer inference is that she did wash for them, but did it to oblige; and though remunerated for it,

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was so remunerated not as matter of bargain, but out of good feeling, and from an unwillingness to accept service from a person in her situation without return.

But his own views of his own position are proved beyond all shadow of doubt. When he became engaged to Miss Greene, why did he not go to her father, and ask her hand in marriage? He was a good, well-behaved youth, with nothing against his character. Why did he not propose openly? Because he knew he would be laughed to scorn, or promptly turned out if he did, as being a totally unfit match in point of "social position." So thoroughly well did he know this, that the marriage was not even an open runaway, but a clandestine affair, never revealed till it could no longer be kept secret after the death of Mr. Greene. The reason alleged by Mrs. Kirkwood for this secrecy is too puerile to be treated seriously.

It took place in Carrickfergus, far away (I suppose some thirty miles at least by rail) from Tamlaght o'Crilly. Miss Greene, under a false pretence, left home in the morning by train, was married, and returned home in the evening. Her pretext was something about embroidery work she had to attend to in Belfast. In the notice of marriage given to the clergyman who married them Kirkwood described his intended wife as daughter of Godfrey Barker Greene, farmer, and gave her residence as 49 Antrim Road, Belfast. Her father's name was not Godfrey Barker Greene, but Godfrey Samuel Greene. He was a clergyman; and if he did farm on a small scale, he did so only as other clergymen, with glebes or without, do, and the description of him as a farmer was a practical falsehood, which must have been most deliberate. Her address was not 49 Antrim Road, Belfast; that was a mere invention. Whether there is or ever was such a house he knows no more than I do. He could give no reason for such a shamefully false statement on the public document, a statement which would probably have rendered him liable to criminal proceedings. But though he could give no reasons for this mass of falsehoods, the reason is perfectly plain. All these fraudulent precautions were taken to prevent the marriage from becoming known to the family. Why? Because the family, and especially the head of it, would have viewed such a connection with extreme displeasure. Why? Solely on account of the dis-

parity of position between the parties. He and they had no desire to have their former servant boy, even if now a clerk in a mill, brought to their table and introduced to their friends as one of them. And the point of all this is, that both he and she knew it perfectly well, and thus recognised in the most emphatic way it is possible to conceive that he was a man "beneath her in life, that is to say, a man below her in social position." The most painful part of the case to me is that I cannot free the lady herself from complicity with her husband in the deliberate misstatements made to the clergyman who married them, nor from some misrepresentations of fact within her own knowledge in her sworn evidence in Court. But I do not like to dwell on this; and indeed some excuse may be found for her weakness in this respect.

The result is that except in this transaction itself nothing appears to affect the character of Kirkwood. But I have to decide nothing about character; and on the question which I have to decide there is no possible doubt that Sarah Barker Greene married a man "below her in social position," and so has lost this little property.

I would gladly have come to a different conclusion. Her husband is a worthy young man, if not one of refined sense of honour. If his appearance, manner, and mode of speech do not impress a stranger favourably in regard to his education and culture, these things are unimportant, and many very worthy persons in much higher social grades than he suffer from similar drawbacks. He pleased Miss Greene, and that is what he mainly desired. But his manners and mode of speech are those of a very different class from hers. If the brothers who take this property, both of them clergymen, had seen their way to abate their strict rights in the matter, and accept that which was accomplished, I should have been well pleased, especially as the lady has not had what her father no doubt thought she would have had, a choice whether she would take Kirkwood without the land, or the land without Kirkwood. When she learned of the dilemma it was too late to choose. I have nothing to do with this. My judgment must be for the plaintiffs, notwithstanding a very strong feeling on my own part that the control which testators have by law in respect of their property after their death ought not to be exercised

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in an arbitrary manner, and uninfluenced by the belief I entertain that this clause in Mr. Greene's codicil was introduced for the very purpose of preventing this particular marriage from taking place.

W. L.

Appeal. June 5.

The defendant, Sarah Jane Kirkwood, appealed. (1).

Gordon, Q.C., and *Bates*, for the appellant.

Ronan, Q.C., and *Henry*, for the respondent, were not called on.

WALKER, C. :—

We are all of opinion that the decision of the Master of the Rolls is right, and that there is no ground for the appeal. It is right to observe at the outset that, for my own part, I regret to have to decide the case on the ground which must form the basis of my judgment. Mr. Kirkwood may be the best of husbands, and an excellent father, and he may raise himself to a high position in Belfast. But the test is the day of his marriage, and what was his social position then; the question is:—Whether Sarah Greene married a man "below her in social position" on the 28th September, 1891. The testator had a right to impose such a condition, being a lawful one, and we must give effect to it, and the fact, as Mr. Bates has said, that 999 men out of 1000 would probably arrive at the same conclusion as the Master of the Rolls, might of itself be sufficient to induce us to say that we entirely concur in that conclusion. Looking at the facts, the case to my mind is a very clear one. Mr. Greene was a true type of his class; he had a clergyman's training and a university education, he had been a curate for some time, and then became rector of a parish. At the time of the disestablishment of the Irish Church, he commuted, as a large number of clergymen did, and received £1080, which he invested in the purchase of land.

(1) In the Court of Appeal, before WALKER, C., SIR PETER O'BRIEN, C.J., and BARRY, L.J.

He derived on income of £120 a-year from the lands, his wife had a fortune of £1000, she had a number of brothers, clergymen of the Church of Ireland, and the Rev. Mr. Greene had two sons in the Church of Ireland. He moved in a good circle of society, and his daughter helped in the parish work. Now let us look at Kirkwood: his father was a farmer having seven acres of land, and his brother received a training to qualify him to be a National school teacher. His sister got 1*s.* a-week for assisting in the laundry. That was the family of Kirkwood. He was of a musical turn of mind, and in that way he was brought into connection with the Greenes. When they went to Port Stewart in summer, he went there with them to look after the pony, but it is not proved that he ever sat at table with them, or was treated as one of the family. He was an apprentice in a mill at 17*s.* 6*d.* a week. He has advanced in the world since, and I hope will continue to do so. But if we wanted any further evidence, the history of the marriage itself shows clearly that the husband was not of the same social position as Miss Greene, because being conscious that the marriage would not be approved of, they went off secretly to Carrickfergus, and gave a wrong description of the Rev. Mr. Greene, describing him as a farmer, and after that Miss Greene went back to her own home, and from that till the death of her father she concealed the whole thing. He did not go and ask for the daughter's hand, because he knew he would be refused. That is the question of fact—whether Sarah Greene married a man below her in a social position when she married Kirkwood? It is perfectly obvious that she did.

Now take the question of law. It is not a case of personal estate, and therefore the rules as to personal estate have no application. This is freehold land, and therefore the rule applies that every condition which defeats a vested freehold estate must be definite and certain, and must be so expressed as to leave it in no degree doubtful what the effect is. Mr. Bates cited a number of cases to show that this was too uncertain; the first was *Fillingham* v. *Bromley* (1), in which the condition was that the devisee should "live and reside" on the estate. That was held to be too vague,

(1) 1 T. & R. 530.

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because it was difficult to determine what was "residing" on the estate, and in my opinion is totally different from the condition here, of marrying below her. The next case was *Clavering* v. *Ellison* (1), where the condition was too uncertain, because education might mean exclusive education, or higher education, or intellectual education. This is just as clear a condition as that a person should marry a Protestant or a Scotchman. I am of opinion that the decision of the Master of the Rolls is right, and that this lady was bound by the condition, which I am tolerably certain was directed against this very marriage.

SIR PETER O'BRIEN, C.J. :—

I concur, and I have little, indeed, to add to what the Lord Chancellor has said. The case is a very clear one, and from the moment the appeal was opened I really had no doubt as to what ought to be the result. I repeat what I said during the argument, if this case were mentioned out of Court to an ordinary layman he would have no doubt about it. It is only when the case comes into Court, and where there is an exercise of ingenuity by astute counsel, that any doubt can even be suggested.

The facts have been fully stated by the Lord Chancellor. The testator, who was the rector of a parish in the North of Ireland, bought some property in the county of Londonderry, which he devised by his will to his two daughters. In the codicil to his will there is a provision that if either of his daughters should marry a man "beneath her in life, that is a man below her in social position," her share should go over to her brothers. Now, the rule of law is that a condition of defeasance attached to a gift of real estate must, in order to be operative, be plain and free from uncertainty. Taking the language of the instrument itself, what ambiguity or want of clearness is there? If she shall marry a man "below her in social position," this appears to me to be perfectly clear and perfectly certain. Mr. Bates, in his able argument, put the case in the only way it could be argued. He said it was a mere matter of opinion as to what "social position" was, that opinions differed and fluctuated, there was no fixed standard, and, therefore,

(1) 3 Dr. 451.

the condition was uncertain and void. In my opinion the question as to whether a person is in the same social position as another is a question of fact, the ascertainment of which depends, as in the case of many other questions of fact, on all the circumstances of the case, and on the opinion of the tribunal which is to decide it. Well then, the condition is plainly expressed, and is a question of fact; there is nothing illegal in the condition—it is a good condition in law; this being so, the question arises—has the event occurred upon which the estate is to go over? In my opinion it plainly has. Can it be said that this lady and the man she married were in the same social position? She was the daughter of a rector of a parish. A rector of a parish has a considerable social position; he has, as a general rule, the *entrée* into the best society in his parish or county. I do not speak of "sets" which exist in some of the larger cities or centres of social intercourse, and may perhaps be distinguishable only by some hardly palpable degree of fashionableness or by the idiosyncrasy of those who belong to them; but I refer to social grades which are well understood, distinctive of social positions. Whether a person is in this or that social grade is a matter of fact; and to say that the son of a tenant of a small farm of seven acres of land who lived in a gate-lodge, and who has worked his way into the position of an assistant book-keeper, is in the same social position as the daughter of a rector of a parish, who was the owner of the farm and of the gate-lodge, is, in my opinion, to advance a proposition that borders on the preposterous.

The judgment of the Master of the Rolls is right, and his decision should be affirmed.

BARRY, L.J.:—

This case has been very ably argued by Mr. Bates; but he has failed to convince me that there is any difficulty in it. I think the Master of the Rolls was right.

Solicitor for the plaintiffs: *W. J. Venables.*
Solicitor for the defendant: *Wellington Young.*

R. D. M.

Monroe, J.
1894.
Oct. 31.
Nov. 1, 14.

IN THE MATTER OF THE ESTATE OF JAMES SLOANE, OWNER; WILLIAM CARSON AND WILLIAM GEO. SLOANE, PETITIONERS.

Priority—Conflicting equities—Equitable mortgage—Future advances—Service of conditional order for sale.

A trust fund was settled upon S. for life, remainder to his wife for life, remainder to their children. The trustees had power to invest the fund upon leaseholds for an unexpired term of 100 years. S. being possessed of a plot of ground, held for 500 years under a lease which contained a covenant to expend £2000 in building on the lands, the trustees applied the trust fund in erecting houses thereon, without obtaining an assignment of the lease or possession of the title-deeds. One of the trustees, on being subsequently advised that a breach of trust had been committed, commenced an action against his co-trustee and S., and obtained a judgment declaring that the trust fund was a lien upon the houses and premises. Prior to this action S. had deposited the lease of the premises with a Bank, to secure his then present and future indebtedness.

The Court, being of opinion, on the evidence, that the Bank had no notice of the breach of trust, and that the trustees, though guilty of laches, were not parties to the fraudulent conduct of S.:—

Held, that *In re Ffrench's Estate* (21 L. R. Ir. 283) was undistinguishable, and that the Bank, notwithstanding that they had not called for a legal mortgage, were entitled to priority over the claims of S.'s wife and children to the extent of advances made to S. on foot of the equitable mortgage before service of the conditional order for sale.

OBJECTION by the petitioners as trustees of the settlement of the 18th July, 1872, executed on the marriage of the owner, to the priority of the Provincial Bank of Ireland, equitable mortgagees, as appearing in the schedule of incumbrances.

The circumstances are fully stated in the judgment, *infra* p. 150.

Carton, Q.C., *Samuels, Q.C.*, and *Jefferson*, in support of the objection:—

An equity attached to the houses in erection of which the trust property was expended, and nothing has occurred to dis-

place that equity in favour of the Bank. An equitable mortgage only gives to the mortgagee what the mortgagor has: *Manningford Toleman* (1) is not distinguishable from the present case. There is no pretence that Mrs. Sloane was an acquiescing party, and the children were minors. The *cestui que trust* is not affected by the trustees' laches: *Cory* v. *Eyre* (2). The Bank were put upon inquiry: *National Provincial Bank of Ireland* v. *Jackson* (3).

Kenny, Q.C., and *J. H. Moore*, for the Provincial Bank:—

The conduct of the trustees was such as to enable James Sloane to make the houses over to a *bona fide* purchaser for value without notice. As to *Manningford* v. *Toleman* (1) there was in that case a pre-existing equitable title or interest in the estate. The *cestui que trust* was entitled to purchase the house in his own name under the trusts of the settlement. The breach of trust only began after the purchase of the house. The *cestui que trust* was himself a trustee. But here the person depositing the documents was not the trustee. *Cory* v. *Eyre* (2) was a contest between two incumbrancers.

Here, until the 22nd January, 1884, the date of the judgment in *Carson* v. *Sloane* (4), the claimants had a floating equity only. It was not an estate. It was a mere right of action—the right to put a Court of Equity in motion. *In re Lambert's Estate* (5) was a case where there was negligence on the part of the equitable mortgagee in leaving all the title-deeds but one with the owner. The present case is undistinguishable from *In re Ffrench's Estate* (6). There the distinction was clearly established between an equitable interest or estate, and a right to sue or a right to assert a particular equity, which would be brought to fruition by a decree of a Court. [Counsel quoted from the judgments of the Master of the Rolls in *In re Ffrench's Estate* (6)]. *Rice* v. *Rice* (7) was the case of a vendor's lien on an existing interest.

As to the alleged notice, Mr. Saunders, the manager of the

(1) 1 Coll. C. C. 670.
(2) 1 De G J. & S. 149.
(3) 33 Ch. D. 1.
(4) 13 L. R. Ir. 139.
(5) 11 L. R. Ir. 534; 13 L. R. Ir. 234.
(6) 21 L. R. Ir. 283, 308, 309.
(7) 2 Drew. 73.

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Bank, was only examined at the trial of *Carson* v. *Sloane* (1) upon the single point, whether James Sloane deposited the lease of 1879 with the Bank. The plaintiffs in that suit were not impeaching the Bank's charge. To postpone the Bank's security, actual notice must be brought home to them. An equitable mortgagee with the possession of title-deeds has a superior equity to one in whose favour a trust has been even declared: see judgment of Kindersley, V.-C., in *Rice* v. *Rice* (2).

Samuels, Q.C., in reply:—

James Sloane had been getting money from the Bank previously to the deposit of the lease. The lease contains a building covenant. The buildings were erected. The Bank were thus put upon inquiry as to where Sloane obtained the money to build. In *The Shropshire Union Railways and Canal Co.* v. *The Queen* (3) it was held that where certificates of shares were deposited by way of equitable mortgage in breach of trust, the depositee was bound to inquire as to the real position of the person pledging the shares. Why should not the same rule prevail where personal property has been invested in land? The principle was applied in *Newton* v. *Newton* (4) by Lord Romilly, who held that the *cestuis que trust's* title was unaffected. And the Court of Appeal, although they reversed his decision on other grounds (L. R. 4 Ch. App. 143), were careful to guard themselves from being supposed to entertain a different opinion of the law upon this point. In *Lewis* v. *Madocks* (5) trust property traced into real estate was held to be a charge upon the estate: see judgment of Lord Eldon, at p. 57. That case was considered by Fry, J., in *Cave* v. *Cave* (6), where he was dealing with the distinction between an equity and an equitable estate. In *Pillgrem* v. *Pillgrem* (7) the same doctrine was held applicable to beneficiaries claiming a graft, their title prevailing against the equitable mortgagee. There was here a pre-existing lease. When the money was invested in building on the leasehold

(1) 13 L. R. Ir. 139, see p. 145.
(2) 2 Drew. 80.
(3) L. R. 7 H. L. 496.
(4) L. R. 6 Eq. 135.
(5) 17 Ves. 48.
(6) 15 Ch. D. 639.
(7) 18 Ch. D. 93.

the trustees made *bona fide* efforts to get security. [MONROE, J.: What do you say the Bank could have done which they omitted to do?] First, they might have asked for a legal mortgage; secondly, they could have inquired where James Sloane got the money to build the houses; thirdly, they might have inquired was there any trust affecting the premises.

In *Ffrench's Estate* (1) the Master of the Rolls does not quarrel with *Pillgrem* v. *Pillgrem* (2). There the only right of the plaintiffs was to go to a Court of Equity and have the new lease declared a graft: the only negligence on the part of the equitable mortgagee was that he did not get a legal mortgage. We could not have commenced an action with any effect in the interval between the completion of the building and the mortgage to the Bank. Such an action could not have been brought to a hearing before the mortgage. In *Ffrench's Estate* (1) the *cestuis que trust* were of age "long before" the mortgage to Tyrrell; and in *Ffrench's Estate* (1) it was impossible for the mortgagee to get in the legal estate. In *Mumford* v. *Stohwasser* (3) Sir George Jessel expressed an opinion (though it was not necessary to decide the point) that under such circumstances the acquisition of the legal estate would be of no avail to deprive the *cestui qui trusts* of their rights. Actual possession of the title deeds is not enough to give priority: *Pillgrem* v. *Pillgrem* (2); *Union Bank of London* v. *Kent* (4); *Carritt* v. *Real and Personal Advance Co.* (5); *Humber* v. *Richards* (6).

J. H. Moore, as to the authorities cited by *Samuels, Q.C.*:—

What inquiry ought to have been made? If it was "where did the money come from?" in *Ffrench's Estate* (1) a similar inquiry would have been necessary. If the money came from a series of persons it would be necessary to trace it through them all. It was not incumbent on the Bank to take a legal mortgage. An equitable mortgage is a well-known security. In England, if a legal mortgagee does not obtain possession of the title-deeds he risks his

(1) 21 L. R. Ir. 283.
(2) 18 Ch. D. 93; see pp. 104, 105.
(3) L. R. 18 Eq. 556.
(4) 39 Ch. D. 238, *per* Cotton, L.J., [p. 245.
(5) 42 Ch. D. 263.
(6) 45 Ch. D. 589.

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priority: *Briggs* v. *Jones* (1); *Clarke* v. *Palmer* (2). Upon the money being handed over to the tenant for life, the trustees were guilty of laches. The cases cited for the trustees were cases where there was a conflict between the equity of the *cestui que trust*, and the mortgagee of the trustee. A trustee cannot of course by mortgaging the trust property for his own benefit create a charge thereon. The trustee is the proper person to hold the deeds, and there is no laches on the part of the *cestui que trust* in leaving the deeds with him. *Humber* v. *Richards* (3) turned on the principle that the client is entitled to trust his solicitor, and it was held that there was no negligence on the part of Horner.

Nov. 14.

MONROE, J.:—

The facts giving rise to the present controversy on the hearing of the final schedule of incumbrances may be shortly stated thus. By a settlement, bearing date 18th January, 1872, executed on the marriage of James Sloane with Mary Ledlie, the wife's property amounting to £1650, was vested in Andrew Watson, and William Carson, upon trust for James Sloane for life, or until he should become bankrupt, or should assign, charge, or incumber the income of the fund, with remainder to Mary Ledlie for life, with remainder to the children of the marriage. The trustees were authorised among other securities to invest the fund in chattels real, held for a term of years, of which not less than one hundred years should be unexpired. On the 6th December, 1872, William George Sloane, the brother and partner of James Sloane, was appointed trustee of the settlement in the place of Andrew Watson, who had refused to act. The trustees about the year 1875 took a lease of certain premises in Morehampton-road, and expended the trust fund of £1650, and a further sum of £50, the property of James Sloane, in building two houses, which were subsequently sold by them in 1880 for a sum of £2035. At this time James Sloane was possessed of a small piece of building ground, also in Morehampton-road, held under a lease to himself, bearing date the 23rd June, 1879, for 500 years, subject to a rent of £20 for one year, and afterwards to a rent of £60. At

(1) L. R. 10 Eq. 92. (2) 21 Ch. D. 124. (3) 45 Ch. D. 589.

the instigation of James Sloane the trustees invested the entire of the trust fund in building three houses, 45, 47A, and 49A, on the plot of ground so leased to James. The lease contained a covenant by the lessee to expend £2000 in building on the lands, and the entire of the trust fund was either given by the trustees to James to erect the buildings, or expended by themselves in doing so, without asking for an assignment of the lease, or deposit of the title-deeds, or any other security whatever. From the date of the advance or expenditure of the money no demand for security was made by the trustees, till after July, 1882; Mr. Carson, one of them, alleging that then, for the first time, he was informed that he had committed a breach of trust. All this time James remained in sole possession and enjoyment of the leasehold premises. Holding the title deeds in his hands he was enabled to deposit, and did deposit, them with the Provincial Bank, on the 18th November, 1881, to secure all past and future advances. This was a mere equitable deposit, without writing, on which certain advances were made; and, on the 14th March, 1882, James Sloane wrote a letter to the manager of the Provincial Bank in the following terms:—"You have a lease of mine dated the 23rd June, 1879, Rev. Thomas B. Wallace to myself, which I handed to you on the 18th November last, instead of a lease dated 2nd February, 1874. I request that you will hold said lease of 23rd June, 1879, as continuing collateral security for any sum due, or to become due, by the firm of James Sloane & Sons, and of which I am a partner, or by me, James Sloane, together with all interest thereon." This memorandum was not registered, and advances continued to be made by the Bank, till the 22nd September, 1885, when the account was closed.

In the month of July, 1882, when Mr. Carson ascertained the nature of the risk he had incurred, he began to press James Sloane for security. A long correspondence took place as to the nature and extent of the security which should be given, but as no definite arrangement had been come to, proceedings in Chancery were commenced by William Carson on the 30th of July, claiming to have the trusts of the settlement of the 18th Jan., 1872, carried into effect, so far as they related to the said sum of £1650, and for that purpose to have a sale of the premises in Morehampton-

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road. The case was heard before the Master of the Rolls, and on the 22nd Jan., 1884, he made his decree, declaring that the said sum of £1650 was a lien upon, and well charged on, the said houses and premises, directing that James Sloane should, within two calendar months lodge the sum of £1650 in Court to the credit of the cause, and that in default thereof the premises should be sold in this Court. The money was not lodged, and a petition for sale was served. The premises have been sold, the purchase-money is now in Court, and the schedule of incumbrances has been lodged.

In the schedule at No. 6 the Provincial Bank are placed as creditors in respect of a deposit of deed made on the 14th March, 1882. The present trustees are placed No. 7 on the schedule in respect of their claim for £1650 under the Chancery decree. Two objections among others were filed—one by the Provincial Bank, claiming that the schedule should be corrected by stating the security of the Bank to be a verbal deposit of deed, made on the 18th November, 1881. This was admitted by the trustees, and the schedule in this respect is to be amended.

The other objection was by the trustees claiming that they should be declared entitled to their £1650 in priority to the Bank. The counsel for the petitioners contended that when the trustees advanced the trust-money to James Sloane to build the houses, or when they themselves expended the money in building them, a charge for the amount so expended was immediately created on the premises; that James thus became a trustee of the premises for them, at all events to the extent of the money invested, and the trustees had thus vested in them an equitable estate; that the Bank thought proper to be satisfied with an equitable instead of the legal estate which they might have obtained, and that as between the two equities, theirs, as the earliest in point of time, should have priority. It was argued for the Bank that the trustees were guilty of gross negligence in not insisting on security before they parted with the money; that the Bank had no notice of any prior charge; that they could not have obtained notice by any reasonable inquiry; that by leaving the title-deeds in James Sloane's hands the trustees placed James Sloane in a position to raise money on an estate apparently unin-

cumbered; that by obtaining the possession of the title-deeds the Bank obtained a usual and a well-known security which would prevent any future incumbrancer from getting priority over them, whether he got hold of the legal estate or not; that the trustees did not obtain an immediate equitable charge on the estate when the money was expended on building, but only a right to apply to the Court of Chancery to give them a charge, and that the Bank had therefore a better equity, a better right to call for the legal estate, and on the whole a right to be preferred to the trustees.

The cases on this subject of conflicting equities are almost innumerable. It was stated by an eminent judge in a recent case (*Cave* v. *Cave* (1)), that the defence of purchase without notice had been the subject of a great deal of decision; that it was by no means easy to harmonise the authorities and opinions expressed on the subject; that criticisms on old cases lay many strata deep; and that the most eminent Chancellors had expressed diametrically opposite conclusions upon the same question. This statement was made fourteen years ago, and although the matter has arisen and been discussed many times since then, I am not sure that we have got much nearer to the desired harmony. The very case which called forth these observations has been itself submitted to hostile, I might almost say destructive, criticism. It would be the merest pedantry to seek to go through and discuss the facts of, and opinions expressed in, these many authorities; but some of them must be referred to, to explain and illustrate the arguments which have been presented to me. The petitioners first applied themselves to the question as to what was the effect of the investment of trust money in the purchase of land, where the trustees took the conveyance in their own names and afterwards dealt with it against the interests of the *cestuis que trust*. Did the trust attach to the lands immediately on the investment being made, so as to vest in the *cestuis que trust* an equitable interest; or were the trustees merely given a right to take some subsequent proceeding to follow the land, and to establish their equity by such proceedings. *Lewis* v. *Madocks* (2) was cited as an early authority.

(1) 15 Ch. D. 639, at p. 646. (2) 17 Ves. 48.

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There a husband, who was only entitled to a life interest in a fund, purchased an estate with the trust money and other money which he had borrowed, and died. His wife, who was next entitled to the fund, claimed the estate against the heir-at-law. Lord Eldon refused to acknowledge such right, but he held that the personal estate bound by the trust was property which might be demanded out of the estate, and that the real estate was chargeable with it. No question, however, arose as to the precise time at which the equity attached to the land, as there was no subsequent purchaser without notice intervening. The same observation applies to *Williams* v. *Thomas* (1). The petitioners, however, further relied on a large number of cases where conflicting equities did arise, and *Manningford* v. *Toleman* (2) was very strongly pressed. There, on the marriage of a ward in Chancery, the husband was allowed a sum of £2000 out of his wife's fortune to be invested in a house, and settled in trust for the wife for life, for her separate use, with remainder to the children in strict settlement, with ultimate limitation to the husband in case of his surviving the wife and there being no children. The husband executed a deed and covenanted with trustees that so soon as he had made the purchase, he would settle the house as agreed on. He did subsequently purchase a house, and took the conveyance in his own name. He some time after deposited the conveyance as security for a loan with a person who had no notice that trust money had been used in the purchase; and the question arose between the *cestuis que trust* and the equitable mortgagee as to who should be entitled to priority. The Court held that the claim of the *cestuis que trust* should prevail, that the husband was a trustee, that the premises from the date of the purchase were affected by the trust, and that there was no negligence for which the *cestuis que trust*, some of whom were minors, could be held responsible. *Cory* v. *Eyre* (3) was also relied on. There money belonging to one Thomas Joseph Eyre was left in the hands of John Sadleir for investment. It was invested by Sadleir in a mortgage of lands in which the legal estate was outstanding, and the conveyance of the equity of redemption was taken in his own name. Sadleir soon after raised money on the mortgage from the plaintiff,

(1) 2 Dr. & Sm. 29. (2) 1 Coll. C. C. 670. (3) 1 De G. J. & S. 149.

who had no notice of the trust, and he died in the year 1856. There was no suggestion that Eyre did not obtain an equitable interest in the land from the moment of the investment, but it was sought to postpone the *cestui que trust* on the ground of his own negligence in not looking after his investment, and in permitting the security to be taken in the name of another person, who was thus enabled to "masquerade" as the owner. The Court (Lords Justices Knight Bruce and Turner) decided in favour of Mr. Eyre, and Lord Justice Turner (p. 169) thus dealt with this argument:—"The very first principle of trusts is that the *cestui que trust* places confidence in his trustee; and if it is to be held that a *cestui que trust* is to be postponed on the mere ground that he did not inquire into the acts or conduct of his trustee, that principle would, as it seems to me, be in a great measure, wholly destroyed. Another part of the negligence imputed to the Eyres is, that they did not ascertain to whom the mortgage was made, in whom it was vested, and in whose possession it was; but to hold they ought to be postponed on this ground would be to lay it down, that no one is justified in trusting his own solicitor. . . . It was said that to decide this case in favour of the defendants would be to hold that no money could be safely lent upon a mere equitable security; but this observation, although striking, is not new, and if equitable securities are to be made perfectly safe, it must be done by the Legislature. We cannot alter the law. Reliance was placed on the fact that the plaintiff got the mortgage deed when he made the advances, but in this case the plaintiff got the mortgage deed by the wrongful acts of the trustee of the defendants, and it is not I conceive the doctrine of this Court that in the case of mere equitable interests priority can be obtained through the medium of a breach of trust or duty."

The petitioners further relied on the case of *Cave* v. *Cave* (1). The facts were these. A person named Charles Cave, the sole trustee of a settlement, got some of the trust money into his hands, and deposited it in bank to the credit of himself and his brother Frederick. A cheque was drawn by both in favour of Frederick, and the money was invested in land, the conveyance being taken in Frederick's name. Money was subsequently raised by Frederick,

(1) 15 Ch. Div. 639.

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with Charles' full knowledge and consent, first on a legal, and afterwards on equitable mortgages. The equitable mortgages were taken without any notice whatever that trust money had been employed in the purchase of the premises. The question there arose between the *cestuis que trust* of the fund and the equitable mortgagees. Both had been equally defrauded by Charles and Frederick Cave. Mr. Justice Fry, in a suit instituted by the *cestuis que trust* for declaration of priorities, decided in their favour, and in reference to the matter so much discussed in the present case made these observations:—"Now the question I have to determine is this, Is the right of the parties to follow this money into the land, an equitable estate or interest, or is it an equity as distinguished from an equitable estate?" He then refers to *Lewis* v. *Madocks* (1), and *Rice* v. *Rice* (2), and thus concludes:—"In my judgment the right of a vendor for unpaid purchase-money is an equitable lien, and the right of the *cestuis que trust*, whose trust-money has been invested in the land is also an equitable lien. I do not think I can really distinguish this equity from such an equitable lien as the Vice-Chancellor held to be in that case [*Rice* v. *Rice*] an equitable estate or interest of the same description as the equity of an equitable mortgagee. Therefore I shall conclude that, within the case of *Phillips* v. *Phillips* (3), the interest of the plaintiff in this case is an equitable interest, and not merely an equity like the equity to set aside a deed, and therefore must take its priority according to the priority of date."

A somewhat similar case also relied on was that of *Pillgrem* v. *Pillgrem* (4). There an executor surrendered a lease belonging to his testator, and took a renewed lease, including additional property, at an increased rent, in his own name. He afterwards deposited the lease as security for money advanced to him, which he applied to his own purposes. The renewed lease contained no mention of the surrender, and the lender did not know the borrower was an executor. In a suit to administer the estate it was held that the lease was in equity part of the testator's estate, and that the equity of the estate, which was prior, should prevail over that of the mortgagee. Mr. Justice Fry based his judgment on the

(1) 17 Ves. 48.
(2) 2 Drew. 73.
(3) 4 De G. F. & J. 208.
(4) 18 Ch. D. 93.

ground that the mortgagee had made no inquiry, and that if he had called for an abstract he might have found that the property was affected by a trust; but the Master of the Rolls (Sir George Jessel), while affirming the judgment, assigned different reasons: "If," he said, "the mortgagee had inquired into the landlord's title he would have got no notice. He was therefore a purchaser without notice, who did not get the legal title; therefore he must take the lease subject to prior equities, that is, to the trust on which it was held. He acquired nothing beyond that except the right to the parchment." These cases were decided in 1880 and 1881, respectively, but the petitioners relied on other and more recent authorities: *In re Vernon, Ewens & Co.* (1) arose in this way. Certain solicitors had £11,000 of a client's money in their hands. They had previously lent £55,000 of their own to Messrs. Vernon and Ewens. Requiring £11,000, they took so much of their client's money, and informed him it was invested in a mortgage from Vernon and Ewens. The solicitors afterwards released the lands from this mortgage, and took another for £50,000 on the same and additional security. This property was afterwards sold to a limited company, who had no notice of the charge, but who did not, and could not, get the legal estate. It was held that, the solicitors were trustees for £11,000 out of the £55,000, and that when the new security was taken, the client's interest was transferred to the new security. It was held that, though the misappropriation of the money was in 1878, and the sale to the company was in 1883, and although the client had never made any inquiry as to the dealings with the fund, the *cestui que trust* had priority over the purchasers. The case came before Lords Justices Cotton, Lindley, and Lopes, and the rule was stated by Lord Justice Cotton to be that, where parties interested failed to get priority in accordance with the date of their security, they had done something which had put an end to their claim. He approved of *Cory* v. *Eyre* (2), alleging there was no negligence on the part of the *cestui que trust*, that there was nothing to excite suspicion, and no reason for inquiry, and that he had done but what other people do in trusting those whom he had a right to trust. *The Union Bank* v. *Kent* (3), a somewhat similar

(1) 33 Ch. D. 402. (2) 1 De G. J. & S. 149. (3) 39 Ch. D. 238.

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case, was cited mainly for an observation of Mr. Justice Fry:—"I know of no case in which the mortgagee has been postponed on the ground that he did not take precautions against future frauds by the mortgagor. You are not obliged to assume every man with whom you are dealing is likely to be a knave."

In *Carrit* v. *Real and Personal Advance Co.* (1), the plaintiff purchased an equity of redemption in the name of his clerk who was entrusted with the deeds. The clerk raised money on the deeds, but the employer was given priority over the equitable mortgagee, inasmuch as he had no reason for suspecting his clerk.

Many other cases of a similar character were cited, including, *Humber* v. *Richards* (2). I only refer to one other case on this subject, which was used for an expression of opinion by Lord Cairns in the House of Lords. It is that of *The Shropshire Union Co.* v. *The Queen* (3), and is somewhat remarkable for this reason that the unanimous judgment of the Queen's Bench was unanimously overruled by the Exchequer Chamber, and the unanimous judgment of the Exchequer Chamber was unanimously reversed by the House of Lords. It is unnecessary to mention the facts in detail; but at pages 506 and 507 of the report Lord Cairns says that a pre-existing equitable title "may be defeated by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and take away the pre-existing equitable title. But," he says, "I conceive it to be clear and undoubted law, and law which is required for the safety of mankind, that in order to take away any pre-existing admitted equitable right, that which is relied on for such a purpose must be shown and proved by those upon whom the burden to show and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced" . . . "My Lords," he continues, "in the first place, the arguments at your Lordships' bar on behalf of the respondent, appeared to me to go almost to this, that whenever you have an equitable owner who is the absolute owner, that is to say, entitled to the whole equitable interest, such a person

(1) 42 Ch. D. 263. (2) 45 Ch. D. 589. (3) L. R. 7 H. L. 496.

ought not to have a trustee at all holding the *indicia* of legal ownership; or, if he chooses, for his own purpose, to have such a trustee, he must be in danger of suffering for every act of improper conduct by that trustee; and that therefore, if the person entitled absolutely to the equitable interest in a share in a railway company chooses for his own purpose to have that share standing in the name of a trustee for him, he will be bound not merely by a valid legal transfer of that share by the trustee, but by any equitable dealing or contract which the trustee may choose to enter into. My Lords, that is a very serious proposition. It goes not merely to shares, but it goes to land and to every other species of property; and it goes to say, that whereas there is a large, well-known, recognized and admitted system of trusts in this country, that system of trusts is to be cut down and moulded and reduced to this, that it is to be a system applicable only to infants, married women, or persons with limited interests; and that wherever the limited interest has ceased, and the equitable interest has become entire and complete without any limit, there the equitable owner is under some measure of obligation with regard to his duty of watching his trustee, an obligation which does not lie upon a limited owner. I find no authority for such a proposition, and I feel satisfied that your Lordships will not be disposed to introduce, for the first time, that as a rule of law."

These were the main authorities referred to by the petitioners' counsel, who contended that they establish these propositions; 1, that the moment trust money is rightly or wrongly invested in real estate, that moment the *cestui que trust* has an equitable estate vested in him, and that, therefore, when James Sloane, or the trustees expended the trust fund in building houses on James Sloane's land, the persons beneficially entitled, viz. the wife and minor children, had an equitable estate in those lands and houses; 2, that if the trustees have been guilty of fraud, or negligence, in not taking an assignment by way of security from James Sloane, or in not getting in the title-deeds, the *cestuis que trust*, the wife and minor children, are not to be affected by such negligence, as they had no reason to suspect their trustees.

This reasoning and these authorities are met on the part of the Ulster Bank by the decision of the Court of Appeal in this country in

Monroe, J. 1894. *In re* Sloane's Estate.

the case of *Ffrench's Estate* (1), by which, if it applies, I am of course bound. *Ffrench's Case* (1) contained many matters which are outside the present discussion. I merely take the leading facts which gave rise to discussions similar to the present, with the view of seeing what principles of equity were enunciated, and how far previous decisions were modified or overruled.

In the year 1825 a money fund of £9199 19*s.* 11*d.* was, on the occasion of the marriage of the Hon. Martin Ffrench, vested in trustees, in the events which happened, in trust for Martin Ffrench for life, then in trust for the children as he should appoint, and in default of appointment for the children equally. The trustees had power to invest the fund in the purchase of land. In 1832 Martin Ffrench purchased the Ballinamone estate for £14,000, and he induced the trustees to lend him the trust fund to form part of the purchase-money, the rest being supplied by himself. He took the conveyance in his own name. There was nothing on the face of the deed to show that any part of the purchase-money consisted of the trust fund, and the trustees do not appear to have asked for or obtained any security. Martin Ffrench registered his deed, and continued in possession of the lands as his own, borrowing money on the security of the legal or equitable estate, as he required it. In 1856 he borrowed £15,000 from the trustees of Mr. Tyrrell, a solicitor, who investigated the title, got in the legal estate, and never heard anything about the trust money. There is nothing to show that any question was ever asked as to where Martin Ffrench got the purchase-money of the estate, and it is not at all likely that any such inquiry was ever made. Further sums of money were, from time to time, borrowed by Martin Ffrench, and secured by a deed of mortgage, duly registered, bearing date the 3rd September, 1868, and the title was properly investigated from the date of the mortgage of 1856. Mr. Ffrench, by his will dated in 1865, appointed the residue of the trust fund to his two daughters, and he died in 1871. In November, 1875, a petition for sale was filed in the Landed Estates Court, and a question arose on the settlement of the final schedule, between the daughters of Martin Ffrench and the repre-

(1) 21 L. R. Ir. 297.

sentatives of Mr. Tyrrell, as to the relative priorities of the trust fund and the moneys secured by the mortgage of 1868, which was only an equitable charge. On a review of the authorities then cited I felt constrained to come to the conclusion that, however hard it might be on Mr. Tyrrell's representatives, and however unsafe it might be to deal with equitable securities, the *cestuis que trust* were entitled to priority. The representatives of Tyrrell appealed, and the case was heard on appeal before the Master of the Rolls, Lord Justice FitzGibbon and Lord Justice Barry, who came unanimously to the conclusion that the view I had taken was erroneous. The Master of the Rolls, in delivering the leading judgment, proceeded to consider, as between the contending parties, which of them had the better equity, stating it was impossible to avoid the conclusion that the equity which was prior in time was to be preferred, unless there was something in the case which made the equity of those claiming through Tyrrell a "better equity" within the meaning of *Rice* v. *Rice* (1). He dealt very fully with the case of *Cave* v. *Cave* (2). He could find no important distinction between it and the case before him, "except the time at which, and the circumstances under which, the claim is here made, if it be not the fact that there is either no breach of trust at all in this case, or one differing widely from that which existed in *Cave* v. *Cave* (2)."

He then asks is *Cave* v. *Cave* (2) well decided? Is Fry, J., right in holding that the right to follow a trust fund into land, in which it has been improperly invested is an equitable estate, as distinguished from an equity, and if so whether the equities are in all respects equal? His answers to these questions are best given in his own words. "But," he says, "apart from laches, in my opinion, the equity of the appellants here is a superior equity to that of the respondents. The right to follow trust funds is a right to do something—to take steps to alter the existing, open, notorious enjoyment of property. The primary right of the *cestui que trust* is against his own trustees, whom he can compel to restore the funds out of their own estates. The right to trace the fund into its improper investment is ancillary to this, or in substitution for

(1) 2 Drew. 73. (2) 15 Ch. Div. 639.

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it. As against the trustees, it is as complete an equity as may be; but as against innocent purchasers, permitted to deal with the apparent owner of the property, as if no such right existed, I cannot think that it ought to prevail, that is when the purchaser has done all that is in his power to complete his title. The one man does everything that law and usage require to guard his rights; the other takes no step. With every respect for the high authority on which the apparently contrary opinion rests, I am unable to regard these equities as equal. So far as the trustees are concerned, and anyone dealing with them for the trust property without notice, the equity is effective. But as against the purchased property, the right is, in my opinion, incomplete till steps are taken to assert it; and in the meantime, I regard the right as rather in the nature of a *chose in action* than an estate—an equity as distinguished from an equitable interest—and therefore inferior to that of Tyrrell's representatives."

But, even supposing that the right to follow a trust fund into an improper investment in land conferred a lien upon and an interest in the land, as distinguished from an equity, or mere right of suit, he was of opinion that it was a lien which ought to be asserted without delay, and that owing to the length of time which had elapsed since the breach of trust by the trustees had taken place, enabling the tenant for life to commit a fraud, the prior equity had been lost on the principle that, as between two persons otherwise innocent, the loss must fall on him by whose default it has been rendered possible. In such a case as that, the delay or neglect of the trustees in not taking steps to enforce their rights against the land must be held to bind their *cestuis que trust* whose remedy, if any, would be against the trustees and their estates.

For these reasons he held first that the title of the mortgagee was a better one in equity than that of the *cestuis que trust*, by reason of the neglect of their trustees, or themselves or both, and that therefore *Cave* v. *Cave* (1) did not govern the case, and second, that if laches were out of the case, the equity itself was inherently a lower one than that of the equitable mortgagee.

Lord Justice Fitz Gibbon also dealt with *Cave* v. *Cave* (1) and, con-

(1) 15 Ch. Div. 639.

trasting it with *Ffrench's Case* (1), relied on the fact that the former was one in which the Court was dealing with a trustee and tenant for life who were themselves parties to an actual fraud, whereas in *Ffrench's Case* (1) they had the tenant for life, the only party to the fraud, while the trustees were only guilty of neglect, bringing them within the principle of *Rice* v. *Rice* (2). I am not quite certain how this distinction was to apply unless it be that while *cestuis que trust* are not bound by the fraud of their trustees, they are bound by their negligence and laches. This was indeed the ground which Mr. Kenny took in dealing with the case of *Manningford* v. *Toleman* (3), where the fraud was committed by the tenant for life who had constituted himself a trustee. But at all events the Lord Justice was very clear in his view that where there has been merely laches on the part of the trustees, whereby the trust property has innocently got into the hands of purchasers for value, the *cestuis que trust* are bound by such laches. "I think," he says, "that where *cestuis que trust* are represented by trustees and are acting, or must claim, through trustees in whom the legal estate is or ought to be vested, and where innocent and independent third parties have been misled or *defrauded* by the conduct or through the laches of those trustees, such *cestuis que trust* cannot be better off, in equity, than if they had been *sui juris*, and had themselves acted as their trustees did. It cannot deteriorate the equity of the opposite party when founded on laches or misconduct exposing him to loss or fraud, that the person whose acts have had the injurious effect was a trustee and not a beneficial owner. I do not think that *Cave* v. *Cave* (4) is any exception to this rule, and if it were I should hesitate to follow it. There the tenant for life and the solicitor were parties to a fraud; here I find no evidence that the trustees of the settlement were parties to any fraud, but they committed a breach of trust by negligently and improperly allowing the trust fund to be paid to the tenant for life, in allowing him to buy land with it in his own name, and in not seeing that it was secured upon that land or otherwise. In such a case, as against an innocent purchaser of the land, I cannot regard the effect in equity of the trustees' conduct as different from what it would have

(1) 21 L. R. Ir. 283.
(2) 2 Drew. 73.
(3) 1 Coll. C. C. 670.
(4) 15 Ch. Div. 639.

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been if they had been acting on their own behalf and dealing with their own money. To do so would be to make the equitable position of the innocent party dependent not on his own acts or conduct, nor on those of the party by whose acts or conduct he was misled or lulled into false security, but upon the accidental relationship of that other party to *cestuis que trust*, whom he represented, but who were utter strangers to the innocent purchaser, who could not even discover their existence. For the balancing of equities under such circumstances I must weigh the conduct attributed to the trustee as if it were the conduct of a beneficial owner; for as against the opposite party, the trustee has all the powers, and as it seems to me must be under all the obligations, of a beneficial owner, and if loss ensues from the trustees' conduct the *cestuis que trust* must look to their own representative, and not to the innocent person whom he has exposed to loss."

Lord Justice Barry expresses himself to the same effect:— "Now," he says, "of course children claiming as purchasers under an antenuptial settlement are entitled to, and do receive, great protection against the carelessness or misconduct of trustees, but I cannot hold that, under such circumstances as the present, *cestuis que trust* can so completely dissociate themselves from the acts and conduct of their trustees as that an estate can be for years held forth to the world as open to the ordinary dealings in land between man and man, and that when persons have honestly lent their money on the security of the estate, children claiming under a latent and undiscoverable equity, such as is relied on here can come forward and say, 'True you have been grossly deceived, and the persons who deceived you, or enabled others to deceive you, were our trustees; but you, not we, must suffer.' Children of a marriage claiming under an antenuptial settlement are purchasers for value; but who makes the purchase for them? It is made through the agency of their grandparents or parents, or other persons concerned in the arrangement and framing of the settlement. It is the duty of such persons to select careful and honest trustees, and if they fail in that duty, and select those who are careless or dishonest, and either the children or innocent strangers must be defrauded by the acts of such trustees, the loss should fall on those whose agents chose the faulty trustees, rather than on the

strangers, assuming, of course, the latter to be guilty of no negligence or default."

I am of course bound by these expressions of opinion, unless there be something to exclude their applicability. The nature of the equity, viz. a right to follow the land is the same here as in *Ffrench's Case* (1), and is, therefore, to use the expression of the Master of the Rolls, a "lower one" than that of an equitable mortgage by deposit. The laches or negligence of the trustees has not extended over so lengthened a period, but it has continued long enough to allow the mischief to be done, and to enable the Master of the Rolls to pronounce the decree against them and the lands, which he did in *Carson* v. *Sloane* (2). The negligence of the trustees is therefore as binding on the *cestuis que trust* as if it had been their own. The counsel for the petitioners argued that there had been fraud upon the part of one of the trustees at all events. But even if the distinction were held to be material, I have nothing to show me that Wm. George Sloane was a party to the original equitable deposit on the 18th November, 1881, or that he was a party to the letter of the 14th March, 1882; or that he or his firm ever got any portion of the money raised from the Provincial Bank. My attention has not been called to any such evidence. These cases, therefore, resemble one another in the nature and quality of the equities of the respective contending parties, and in the fact that the laches amounting to a breach of trust, was laches for which the *cestuis que trust* are responsible.

Is there anything in which they differ? It was most ably contended on behalf of the petitioners that there is, viz. that while in *Ffrench's Case* (1) the equitable mortgagee had done everything which was possible, in inquiring into the title, and finding the impossibility of getting in the legal estate which was outstanding in his own wife's trustees, in this case, though there were grounds of suspicion, the Provincial Bank made no inquiries, and did not seek to fortify their position by getting in the legal estate. The only ground for suspicion which was suggested was that, on some previous occasion, James Sloane had borrowed money from the Bank on the security of other property, and seeing a covenant in

(1) 21 L. R. Ir. 297. (2) 13 L. R. Ir. 139

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his lease to expend £2000 on building, they ought to have suspected he was not building with his own money, but probably or possibly with trust-money belonging to somebody else. This is rather a strong proposition. I do not know when he borrowed before. I do not know how much he borrowed. I do not know whether the money borrowed had been paid; and the fact that the money was borrowed on other security showed at all events that he was possessed of property other than that proposed to be pledged. But is it essential or usual when purchasing a property to ask not merely for an abstract of title to the lands, but an abstract of title to the money with which the vendor had himself purchased? Sir George Jessel thought not. Lord Justice Barry considered in *Ffrench's Estate* (1) that no one would ever dream of making such an inquiry. Indeed, if the contention here be correct, the person who takes an equitable security must, to be safe, inquire not merely where the owner's purchase-money came from (he may have satisfied himself as to that); but he must also inquire where the money to make improvements came from, lest he should hereafter find a "subterranean equity" lurking under every house on the estate.

The point, however, most insisted on as distinguishing this case from *Ffrench's Estate* (1) was that the Provincial Bank chose to take an equitable security when it was open to them to have called for a legal mortgage. That, as I understand it, comes to this, that however superior both in character and circumstances the equity of a second incumbrancer may be, if he do not insist on having the legal estate when it is open to him to have it, all his merits are to be overlooked, though the nature of the security be such that no subsequent legal mortgage could affect it, and no injury has been sustained by reason of the omission. No direct authority was cited for this; but reference was made to the passage in the judgment of the Master of the Rolls in *Ffrench's Estate* (1), already quoted (p. 312), where he uses the expression, "when the purchaser has done all that is in his power to complete his title"; and the passage (p. 310) where he suggests that possibly *Pillgrem* v. *Pillgrem* (2) could be distinguished from *Ffrench's*

(1) 21 L. R. Ir. 283. (2) 18 Ch. Div. 93.

Case (1), because of the omission to get in the legal estate, though this was not the basis of Sir George Jessel's judgment. The security taken by the Bank was one well known and recognised in this country. When Judge Flanagan (in *Burke's Estate* (2)), decided that there was an equity capable of being raised against the person taking a mere deposit, by reason of its being left open to another person to take a subsequent security which might be and was registered, his opinion was overruled by the Court of Appeal (3), and it was held that a purchaser taking the legal estate by registered deed must be postponed to the equitable mortgage by deposit when he had taken no pains to inquire after the title deeds. Indeed in the leading case of *Rice* v. *Rice* (4), where the contest arose between a vendor's lien for purchase money and an equitable deposit, the equitable mortgagee having the superior equity was allowed priority though he had not got in the legal estate which would have put end to all controversy. Should the omission to take the legal estate, when it is possible, be fatal to the best of superior equities (which is very like superior merits), it is easy to see that hundreds of the titles which are usually taken by Banks by equitable deposits will be destroyed, and that serious complications may arise. Suppose, in the present case, James Sloane had, after the equitable deposit, conveyed the legal estate by registered deed to another mortgagee ignorant of the alleged equity of the *cestuis que trust* and without inquiring after the deeds, his legal estate would give him priority over the *cestuis que trust*, while he would himself be puisne to the Bank (*Burke's Estate* (3)). Thus the third incumbrancer would be prior to the first, but puisne to the second. Taking the case as one in which the Bank has, according to the principle of *Ffrench's Case* (1), the superior equity, but for the omission to get in the legal estate, I cannot hold that it loses its position or that it is prevented from taking the superior place solely by reason of such omission, which caused injury to no one.

Another point was made by the petitioners which may be shortly dealt with. The security of the Provincial Bank was one for past and future advances, and of course all future advances

(1) 21 L. R. Ir. 283.
(2) 7 L. R. Ir. 57.
(3) 9 L. R. Ir. 24.
(4) 2 Drew. 73.

Monroe, J. 1894. *In re* SLOANE'S ESTATE.

were made at their own risk if once they had notice of another incumbrance. It was contended that the Bank had notice at one or other of three dates:—1. When the case of *Carson* v. *Sloane* (1) was registered as a *lis pendens*. This was, however, abandoned. Registration did not, it was admitted, amount to notice. 2. When the case of *Carson* v. *Sloane* (1) was at hearing and an officer of the Bank was subpœnaed and attended the trial to produce deeds. An allegation having been made in the evidence that James Sloane had deposited deeds, which fact was denied, although the matter was not very material to the issue the officer of the Bank was required by subpœna to attend with the deeds. He has stated in his affidavit that he did attend, that he knew and cared nothing about the case or its nature, that he had no idea the Bank might have any interest in the controversy, that he was asked to produce the deed and nothing more, and that he never heard of the judgment or anything more of the case. It would be going too far to hold that this amounted to such notice to the Bank as to put it on inquiry or to stay any further advances. 3. It was contended, though not raised by the objection, that when the Bank was served with the conditional order for sale they had notice of all claims affecting the estate, and this I take to be well founded. The Bank must therefore be postponed to the petitioners in respect of any sums which may have been advanced subsequent to that date, but it must have priority for prior advances still remaining unpaid.

RULING.

Allow the objection of the Provincial Bank, with costs. Disallow the objection of the petitioners, save in respect of moneys, if any, now due in respect of advances made by the Bank subsequent to the service of the order for sale on the 8th day of April, 1884.

Solicitor for the Petitioners: *Bennett Thompson.*

Solicitor for the Bank: *Tweedy.*

W. G.

(1) 13 L. R. Ir. 139.

BALTIMORE EXTENSION RAILWAY CO. (Limited); Ex parte DALY.

M. R.
1894.
Nov. 21.

Compulsory purchase—Railways (Ireland) Acts—Traverse—Interest—Conveyance.

An owner of lands taken by a Railway Company, under its compulsory powers, executed a conveyance to the Company of his interest in the lands in consideration of payment of £80, being the amount of compensation awarded to him on the hearing of a traverse. No claim for interest was made at the time of the execution of the conveyance:—

Held, that the execution of the conveyance did not estop the owner from afterwards claiming interest on the amount awarded from the time of entering on the lands down to the date of payment of the amount awarded.

Petition.

This was a petition, under the Railways (Ireland) Acts, 1851–1860, by Patrick Daly, for an order declaring him entitled to the sum of £10 7*s.*, interest on the sum of £80, being the amount awarded to him by the verdict of a jury, on the hearing of a traverse at the Cork Spring Assizes of 1893. The lands in respect of which the claim was made were taken by the Baltimore Extension Railway Company Limited under the compulsory powers conferred by the Baltimore Extension Railway Order, 1891, and consisted of 3 roods and 36 perches, portion of a farm held by the petitioner under a judicial lease; possession was taken on 20th November, 1890. On 9th November, 1892, the sum of £34 19*s.* 2*s.* was awarded by the public arbitrator to the petitioner as compensation for his interest in the lands taken.

The petitioner traversed the award, and the amount of compensation was increased to £80 by the verdict of a jury on the hearing of the traverse at the Cork Assizes in March, 1893. On 26th May, 1893, the said sum of £80 was paid to the petitioner by the Company, and a receipt for that amount given by him. On 15th April, 1893, the Company's solicitors sent a draft deed to the petitioner's solicitor for approval, and the same was returned

M. R. 1894.

In re Baltimore Railway Co. *Ex parte* Daly.

approved, and on 30th May, 1893, the petitioner executed a conveyance of his interest in the lands to the Company.

The petitioner alleged that by an oversight, a mistake on his part, the amount of interest, namely £10 7*s.*, being 5 per cent. per annum on the said sum of £80 from 20th November, 1890, to 26th May, 1893, was not demanded by him until 7th June, 1893. The Company declined to pay interest, and this petition was presented on 5th July, 1894.

P. D. Fleming, for the petitioner:—

The petitioner's right to interest under the Railways (Ireland) Acts is not barred by the conveyance. [He cited *Re Belfast Water Commissioners, Ex-parte Dalway* (1), *Re Dublin Wicklow and Wexford Railway, Ex-parte Jordan* (2), *Rhys* v. *Dare Valley Railway Company* (3), *Re Dingle Railway Company, Ex-parte O'Halloran* (4). Browne and Theobald on Railways, p. 138; Davidson's Conveyancing, vol. i. p. 55; vol. ii. p. 825; 14 & 15 Vict. c. 70, s. 17; 23 & 24 Vict. c. 97 s. 2.]

D. B. Sullivan, Q.C., for the Company referred to *Harding* v. *Ambler* (5), and Sugden on Vendors and Purchasers, p. 645, s. 72.

The Master of the Rolls:—

I am of opinion that in this case the petitioner had a right to obtain from the Railway Company interest on the purchase money from the time when the Company took possession. There is a sort of half dispute whether the land was taken under an arrangement with the petitioner, or under the powers conferred by the Railway Acts, and it has been stated in an affidavit filed on behalf of the Company that the petitioner brought actions of trespass against the Railway Company and recovered some small damages for trespass on his land, thus implying that he was in possession. There is, however, no evidence that this trespass was on the lands taken. It is quite consistent with the facts before me that it may have been upon other lands of the plaintiff, and this point was not

(1) 15 L. R. Ir. 13.
(2) 27 L. R. Ir. 79.
(3) L. R. 19 Eq. 93.
(4) Not reported.
(5) 3 M. & W. 279.

pressed. The petitioner was clearly entitled to interest during the time the lands were occupied by the Company, and I think that whatever right existed against the Company still subsists. It has been argued on behalf of the Railway Company that as the conveyance was executed and the purchase money paid to the petitioner, his right to interest, if any, is now barred in accordance with the usual rule in the case of vendor and purchaser. In a case under the Railway Acts the rule, however, is different. Compensation is awarded, and is assessed, by the jury on a traverse, for the value of the lands, and not for the occupation of them during the time the Railway Company may have been in possession. The two things are different. There is nothing in the form of the conveyance to estop the petitioner from alleging that his right to interest, which is an independent matter, is still unsatisfied. There is nothing to show that the parties agreed to submit, or did submit, to the jury the question of compensation for possession as well as that of damages. The decision in *Re Belfast Water Commissioners, Ex-parte Dalway* (1), shows that interest is recoverable apart from the value as ascertained by the finding of the jury, and were it not for the fact of the execution of the conveyance, there would be no question now. The petitioner could no doubt have demanded interest before he executed the conveyance, and in not doing so then he acted unreasonably and perhaps oppressively to the Company. It ought certainly to have been mentioned in the first instance. The real question is whether the conveyance is an estoppel. The conveyance has, however, only conveyed "the estate and interest" of the petitioner in the land, and interest on purchase money in lieu of compensation for possession is not an estate in the land; and whether this document is in form a receipt or a conveyance it does not bar the claim. But inasmuch as the petitioner did not bring forward his claim for interest when the conveyance was about to be executed (as he might have done), in granting this application, the amount £10 7*s*. being agreed on, I say nothing as to costs.

Solicitor for the petitioner: *D. O'Donovan.*
Solicitors for the Company: *O'Connor & Dudley.*

W. L.

(1) 15 L. R. Ir. 13.

M. R.
1894.
Nov. 19.
Dec. 3.

In re CANE'S TRUSTS.

Trustees of stock of English Railway—Death of trustees—No personal representative—New trustees appointed under power—Vesting order—Jurisdiction—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 35—*Trustee Act*, 1893, *Amendment Act*, 1894 (57 *Vict. c.* 10), *s.* 2.

Trustees, in whose name a sum of English Railway Stock stood, died, and there was no personal representative of the survivor. New trustees were appointed under a power in the settlement:—

Held, that in the absence of a personal representative, there was no jurisdiction under the Trustee Act, 1893, to make an order vesting in the trustees so appointed the right to call for a transfer of the stock.

Re Ellis' Settlement (24 Beav. 426) considered.

Summons.

This was an application by way of summons on behalf of Eliza Butler, that the right to call for a transfer, and to transfer and receive, the dividends of the sum of £4500 4 per cent. consolidated preference stock of the London and South Western Railway Company, standing in the books of the said company, in the names of Richard Cane and Joseph Sanders, might vest in Richard Stokes and Frederick Scott Oliver, subject to the trusts of the settlement of the 22nd February, 1864, made between Arthur Beresford Cane of the first part, the Rev. Joseph Stevenson, and the said Eliza Butler, by her then name of Eliza Stevenson, of the second part, and the said Richard Cane and Joseph Sanders of the third part, and that the applicant might be declared entitled to her costs, and that the said Richard Stokes and Frederick Scott Oliver might be directed to pay the same when taxed and ascertained out of the said stock.

By the settlement, which was made on the occasion of the marriage of the said Arthur Beresford Cane with the applicant, a policy of assurance on the life of the said Arthur Beresford Cane for £4000 was assigned to the said Richard Cane and Joseph Sanders (thereinafter called the trustees) upon trust after the solemnisation of the said marriage, to invest with the consent of

the applicant the policy-moneys, when received, in the public stocks or funds of Great Britain and Ireland, or upon Government or real securities, or in the purchase of the preference shares of any railway company paying a dividend on its original shares out of income, with liberty with the like consent to vary the said investments for others of a similar nature, and to pay the income thereof to the applicant for life, and after her death to hold the said trust-moneys, and the income thereof, for the child or children of the said marriage in such manner as the said Arthur Beresford Cane should appoint, and in default of appointment for the children or child of the said marriage, if a son on attaining twenty-one years, or if a daughter on attaining that age or marrying, and if more than one child in equal shares.

Arthur Beresford Cane died shortly afterwards, and the policy-moneys were received and invested by the trustees in their names in the purchase of £4500 4 per cent. consolidated preference stock of the London and South Western Railway Company. Richard Cane died on March 2nd, 1891, and Joseph Sanders, the surviving trustee, died on March 14th, 1893, having made a will, but the executors therein named did not propose to prove it, nor was it likely that anyone would take out administration to him.

By deed of May 11th, 1894, the applicant, pursuant to a power in the settlement, appointed Richard Stokes and Frederick Scott Oliver trustees of the settlement, in the place of Richard Cane and Joseph Sanders. The only persons interested in the trust funds were the applicant, and the only child of the marriage, who had attained twenty-one years of age.

Shekleton, Q.C., for the applicant:—

[He referred to Trustee Act, 1850, sects. 22–25; Trustee Act, 1893, sect. 35; Trustee Act, 1893, Amendment Act, 1894; Rules of June, 1894, Order LXXVII., Rule 9 (*b*); *La Motte's Trusts* (1); *Re Smyth* (2); *Harrison's Settlement* (3); *Dalgleish's Settlement* (4); *O'Gorman's Trusts* (5)].

(1) 4 Ch. D. 325.
(2) 55 L. T. (N. S.) 37.
(3) W. N., 1883, p. 31.
(4) 4 Ch. D. 143.
(5) 25 L. R. Ir. 93.

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Dec. 3.

THE MASTER OF THE ROLLS:—

[Having stated the facts and the nature of the application, proceeded as follows:—]

I have to repeat what I have already said more than once. Where, as in the present case, new trustees were appointed out of Court, and a difficulty arose as to the transfer of stock or other personal property, owing to there being no personal representative of the surviving trustee in whose name the stock stood, a practice seems to have grown up at one time in the Court of Chancery in England, followed in some instances also in this country, to re-appoint the trustees under sect. 32 of the Trustee Act of 1850, and then to make a vesting order under sect. 34 if leaseholds, or under sect. 35 if stock or other personal property. This is what I was asked to do by Mr. Shekleton, who relied on *Re Dalgleish's Settlement* (1), where a sole trustee of leaseholds had died intestate and had no personal representative, and new trustees had been duly appointed under the settlement. The Court of Appeal, reversing the decision of Sir George Jessel, re-appointed the same persons trustees, and made an order under sect. 34 of the Act vesting the leaseholds in them. So in *Re Pearson* (2) where a trustee became a lunatic and a new trustee was appointed in his place under a power in the settlement, the Court of Appeal formally re-appointed the new trustee, and made a vesting order at the same time. Again in *Re Crowe's Trusts* (3), a case like the present, Sir George Jessel held that he was bound by the decision in *Re Dalgleish's Settlement* (1) to make an order vesting the right to transfer a sum of stock in new trustees already appointed, where there was no personal representative of the survivor of the original trustees, in whose names the stock stood. But in *Re Vicat* (4) the Lords Justices sitting in Lunacy declined to follow *Re Pearson* (2). Cotton, L. J., there says:—"I cannot follow *Re Pearson* (2). The order seems to me to have been made *per incuriam*. Where there is any reasonable question whether trustees appointed under a power have been duly appointed, it may be quite right for

(1) 4 Ch. D. 143.
(2) 5 Ch. D. 982.
(3) 14 Ch. D. 304.
(4) 33 Ch. D. 103.

the Court in a proper case to re-appoint them. But where they have unquestionably been duly appointed, the re-appointment of them by the Court is a nullity, and it is, in my opinion, wrong for the Court to profess to appoint them trustees for the purpose of making a vesting order in a form in which it can only be made upon an appointment of new trustees."

Again in *Re Dewhirst's Trusts* (1), North, J., followed the decision in *Re Vicat* (2), and was affirmed by the Court of Appeal, consisting of the same Judges as in *Re Vicat* (2). Cotton, L. J., there says:—"There are already three trustees, and it is desired to re-appoint one of them, not because a new trustee is wanted, but in order to give the Court jurisdiction to make a vesting order under sect. 34. To do so would, in my opinion, be wrong; it would not be a proper exercise of the powers of the Act, because the circumstances contemplated by the Act do not exist. It does not appear to me to be the duty of the Court to make an order contrary to an Act of Parliament in order to relieve the parties of a difficulty. It is for Parliament to amend an Act if an amendment be required. It is not for Judges of first instance or of the Court of Appeal to avoid the difficulty by misconstruing the Act. It is said that there is authority in favour of the petitioners, and that such an order was made by the Court of Appeal in *Re Dalgleish's Settlement* (3). I have always steadily refused to follow that decision. There is no judge for whom I feel a greater respect than Lord Justice James, but whether he had the point brought to his attention and argued before him does not appear in the report. If there was any doubt whether the trustee in that case had been properly appointed, it might be right for the Court to re-appoint him. But if Lord Justice James did express an opinion that a trustee might be re-appointed in such circumstances as those now before the Court, I decline to follow that opinion. I have known cases in which this Court has declined to be bound by previous decisions of the Court of Appeal, even when pronounced by such eminent judges as Lord Justice Knight-Bruce, and Lord Justice Turner. I doubt whether Lord Justice James did decide this

(1) 33 Ch. D. 416. (2) *Ibid.* 103. (3) 4 Ch. D. 143.

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point, but if he did we must overrule his decision, so that the case may no longer be treated as an authority."

In *O'Gorman's Trusts* (1) and many other cases I have held, following *Re Vicat* (2) and *Re Dewhirst's Trusts* (3), with which decisions I entirely concur, that it is wholly wrong to re-appoint trustees already appointed. I need hardly say I should have amended the summons in order to enable this to be done, had it been possible. The Trustee Act of 1893 makes no difference on this point, its language being practically the same as that of the repealed Act of 1850.

Still, treating the case as if it were under the Act of 1850, apart however from sect. 35, there was jurisdiction to make a vesting order as to stock under the earlier sections of the Act; under sect. 22 in the case of a trustee or trustees being out of the jurisdiction, or who could not be found, or concerning whom it was uncertain whether he was living or dead; under sect. 23 in the case of a trustee refusing to transfer for twenty-eight days, after a request in writing; under sect. 24 in the case of one of several trustees so refusing; and under sect. 25 in the case of stock standing in the name of a deceased person. This section comes nearest to the present case. It provides that "where any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the Court of Chancery, or cannot be found; or it shall be uncertain whether such personal representative be living or dead, or such personal representative shall neglect or refuse to transfer such stock, or receive the dividends, or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends and income thereof, in any person or persons whom the said Court may appoint." The stock in the present case might be said to stand in the sole name of a deceased person, if the section applied in other respects, as it practically stands in the name of Joseph Sanders, though the name of Richard Cane the

(1) 25 L. R. Ir. 93. (2) 33 Ch. D. 103. (3) *Ibid.* 416.

co-trustee who predeceased has not been obliterated. But would the section apply? There is no personal representative out of the jurisdiction, nor is there one who cannot be found, nor as to whom it is uncertain whether he is alive or dead.

In *Re Ellis' Settlement* (1), a case resembling the present, the facts were as follows: under a settlement a sum of New 3 per Cents. was placed in the names of two trustees (Everett and Ellis) upon certain trusts. Everett died on the 6th November, 1856, and Ellis died a few days after, having by his will appointed his widow his executrix. She had not yet proved the will. In 1857, two new trustees were appointed under a power contained in the settlement, and a petition having been presented under the Trustee Act, by the tenant for life and the new trustees, Lord Romilly made an order vesting the right to transfer the fund in the new trustees. The order, on the face of it, purported to be made on the allegation that there was no legal personal representative of Ellis, who survived Everett. The Bank of England, having objected to act on the order, the case was mentioned again. It was argued on behalf of the Bank that the order was not within 13 & 14 Vict. c. 60, s. 25, as the case of there being no legal personal representative was not provided for by that section. It was argued on behalf of the petitioner that though the legal personal representative of the surviving trustee had not proved the will, she had neglected to transfer according to the direction of the new trustees for more than twenty-eight days, and that therefore the case came within the cases of *Ex parte Winter* (2), and *Ex parte Haggard* (3), in which Lord Lyndhurst and Lord Langdale had decided that a person so situated was a legal personal representative within the 7 Geo. 4, c. 74, s. 7, and the 1 Will. 4, c. 60, s. 10. Lord Romilly directed the order to be amended, by stating that Mrs. Ellis had neglected to transfer for the space of twenty-eight days.

I have great doubts whether that was a correct decision, and I incline to the opinion that it was not. An executor who has not proved the will of his testator cannot transfer stock of the testator; before he could do so he would have to produce the

(1) 24 Beav. 426. (2) 5 Russ. 284. (3) 1 Beav. 98.

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probate. There are, no doubt, many things an executor can do before probate, but this is not one of them. The decision, however, has not been overruled; and if the jurisdiction which I am asked to exercise was given by this section, I should feel bound to follow the decision, though I did not agree with it. My jurisdiction, however, rests not upon the Act of 1850, but upon the Act of 1893, which Act repealed, amongst other sections, sects. 22–25 and 32–36 of the Act of 1850. Part 3 of the Act of 1893, deals with the powers of the Court as to appointment of new trustees and vesting orders. The section which deals with vesting orders as to stock and choses in action is sect. 35, which corresponds with sects. 20, 22, 26, 31, and 35 of the Act of 1850. It differs, however, in an important particular from sect. 25 of the Act of 1850, which in my opinion, would exclude the application of the decision in *Re Ellis' Settlement* (1), even if I were otherwise bound to follow it; for sect. 25 of the Act of 1850 deals with the case of a personal representative, whereas sect. 35 of the Act of 1893 deals with a trustee, and makes no mention of a personal representative at all. Section 35 provides by sub-sect. ii (*d*), that "where a trustee entitled alone or jointly with another person to stock, neglects or refuses to transfer stock . . . according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled, the High Court may make an order, vesting the right to call for a transfer of stock in any such person as the Court may appoint."

In order to bring a case like the present within the sub-section, it is necessary that there should first of all be a trustee of the stock. Even if an executor, who has not proved, and has refused to prove, can be said to be within sect. 25 of the Act of 1850, I am of opinion that he is not a "trustee" within sub-sect. ii. (*d*) of section 35 of the Act of 1893.

It is to be regretted that the Legislature has not provided in this Act of Parliament for the case, which not unfrequently occurs, of a trustee of stock dying, and leaving no personal representative, and where new trustees have been appointed without the aid of

(1) 24 Beav. 426.

the Court. I cannot grant the present application, either by reappointing the trustees and by making an order under sub-sect. i. of sect. 35, vesting the right to call for a transfer of the stock, or by making a similar vesting order only, under sub-sect. ii. (*d*) of sect. 35. The new trustees appointed out of Court can, however, apply for a limited grant of administration to Joseph Sanders, so they are not without remedy; but I should be acting without jurisdiction, if I were to make any order in this case.

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Solicitors for the applicant: *William Read & Son.*

W. L.

HYNDMAN *v.* HYNDMAN.

(1894. No. 346.)

V.-C. 1894. June 4.

Will—Construction—Gift to wife for life, and at her death to brothers and sister, share and share alike, at their death to their children, share and share alike.

A testator gave all his property to his wife during her life, and at her death to his brothers and sister, share and share alike, at their death to their surviving children, share and share alike:—

Held, that, subject to the life-interest of his widow, the testator's brothers and sister took absolute interests.

Originating Summons by Thomas Hyndman, executor of John Smyth Hyndman, for the determination of the following and certain subsidiary questions:—Whether under the will of John Smyth Hyndman (subject to the life estate therein of his widow) all the brothers and the sister of the testator became absolutely entitled to his property thereby bequeathed as tenants in common in equal shares.

The will dated the 11th Nov., 1853, was as follows:—" . . . I direct all my legal debts to be paid. I will and bequeath all the property I may possess at the time of my death to my wife Jane Hyndman for her sole and separate use during her life, and at her

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death to my brothers and sister share and share alike, at their death to their surviving children share and share alike: I also constitute and appoint my brothers Samuel and Thomas Hyndman and John A. Tighe my executors to this my last will and testament. . . ."

The testator died soon after the date of his will, and probate thereof was on the 22nd December, 1853, granted to Thomas Hyndman, saving the rights of the other executors.

The testator left him surviving his wife, five brothers, Samuel, Barre, James, Henry (a defendant), and Thomas (the plaintiff), and one sister Elizabeth Townley.

Samuel died on the 7th June, 1862, leaving two children one of whom died in 1865, and the other, Elizabeth Mitchell, was a defendant.

Barre died in 1876, without having been married.

James died in 1880, leaving two children, Anne Jane Hyndman and Eliza Gillespie, defendants.

Elizabeth Townley died in 1862, leaving one child Eliza Conn, a defendant.

The testator's widow died on the 11th October, 1893.

John Leech, for the plaintiff.

D. J. Wilson, for Henry Hyndman:—

The brothers and sister became absolutely entitled; the testator's attempt was to create an absolute interest in succession to an absolute interest; the words of the gift to the wife during her life show that he knew how to confer a life estate only. See *Hoare* v. *Byng* (1), *Percy* v. *Percy* (2).

John Cooke, for nephews and nieces:—

The brothers and sister of the testator (a class which, it is not denied, was to be ascertained at his death) took absolutely, subject to the life estate of the widow, with the substitution as objects, of the children of such of them as predeceased the widow: or, the brothers and sister took life estates with remainder to the children

(1) 10 Cl. & F. 508. (2) 24 Ch. D. 616.

respectively. Either of these constructions gives effect to all the words of the will, whereas that relied on by the other side necessitates the striking out of the clause giving the property to the children. As to the first alternative see *Shailer* v. *Groves* (1); as to the second see *In re Houghton* (2) and the judgment of Kay, J., in *In re Russell* (3), where, after referring to the gift to Jane Ferguson, he says "It is the necessary consequence of a gift of that kind that it cuts down the previous gift: and there existed a reason for cutting it down—namely, the fact that Jane had a daughter. Therefore I do not think the context is sufficient to alter the meaning of the former gift. . . ."

THE VICE-CHANCELLOR:—

It is not very easy to say what the testator meant, but I think I must take the words he has used in their ordinary sense.

The meaning of the words "at her death to my brothers and sister share and share alike," without more, is that the brothers and sister took absolute interests, and I cannot import into the clause the words "for their lives." I think therefore the brothers and sister are entitled to absolute interests.

Solicitors for the plaintiff: *T. W. Hardman & Sons.*
Solicitors for the defendants: *Knox and Gilliland.*

D. M'C. M.

(1) 6 Ha. 162.
(2) 53 L. J. (N. S.) Ch. 1018.
(3) 53 L. J. (N. S.) Ch. 400. [See this case on appeal W. N., 1885, p. 21. —REP.]

V.-C.
1894.
Nov. 13.

REYNOLDS, Deceased; M'MAHON *v.* FETHERSTONHAUGH.

(1892. No. 698.)

Principal and surety—Counter security given by principal to surety—Insolvency of surety—Dividend on debts—Rights as to counter-security.

R. gave a bond to M. to secure the performance of certain duties by F. F. assigned to R. certain policies of assurance of less value than the amount of the bond, by way of counter-security to R. F. failed to perform his duties, and the entire amount of the bond became payable. R. died, and his estate was insolvent. F. was ready to assign the equity of redemption in the policies to M., and M. was ready to release R.'s estate on obtaining an assignment of the policies from F. and R.'s personal representative:—

Held, that M. was entitled to the assignment from R.'s personal representative on R.'s estate being released, and that R.'s personal representative should join in the assignment.

Summons.

By their bond dated the 10th January, 1880, Charlotte Fetherstonhaugh and Francis D. Reynolds became respectively bound to C. B. Marlay, the said Charlotte Fetherstonhaugh in the sum of £2000, and the said Francis D. Reynolds in the sum of £1000, subject to the condition that if William Fetherstonhaugh, jun., whom C. B. Marlay had appointed his land agent, should duly account for all rents received by him, and pay over the balances on such accounts, the bond should be void.

In August, 1892, William Fetherstonhaugh, jun., was dismissed by C. B. Marlay, and £21,395 3*s.* 4*d.* was ultimately found to be due by him to C. B. Marlay. William Fetherstonhaugh, jun., subsequently filed a petition for arrangement with his creditors, in which matter C. B. Marlay filed a proof of debt for the said amount.

On the 30th August, 1892, a son of William Fetherstonhaugh, jun., by his father's directions sent by post to Francis D. Reynolds a policy of life assurance for £500, and an endowment policy for

£200, and at the same time wrote to Francis D. Reynolds informing him that the policies were sent to him for the purpose of indemnifying him to the extent of their value against any sum he might be obliged to pay on foot of the bond.

By an indenture dated the 5th September, 1892, William Fetherstonhaugh, jun., absolutely assigned the policies to Francis D. Reynolds. The assignment was admitted to have been made as a counter-security merely to Francis D. Reynolds for any amount he might have to pay to C. B. Marlay in respect of the deficit on the accounts of William Fetherstonhaugh, jun.

Francis D. Reynolds died. The defendant Frances Constance Fetherstonhaugh was his administratrix. The plaintiff as a creditor, on the 27th September, 1892, obtained an order for the administration of his personal estate. The estate was insolvent.

C. B. Marlay paid premiums on the policies to prevent their lapsing. He did not wish the policies to be sold, and he proposed to reliquish his claim against the estate of Francis D. Reynolds, on having the policies assigned to him by the administratrix and William Fetherstonhaugh, jun. The latter, who had obtained his certificate in the arrangement matter, was willing to concur in an absolute assignment of the policies to C. B. Marlay.

On the 7th November, 1893, C. B. Marlay applied to the Vice-Chancellor for an order that the administratrix might be at liberty to join in assigning the policies, and that the claim of C. B. Marlay might be expunged from the claim sheet. This application was adjourned until the hearing on further consideration.

The Chief Clerk in his certificate returned C. B. Marlay as a creditor for £1000, and the policies as outstanding personal estate of the deceased. The case was heard on further consideration on the 6th November, 1894, when C. B. Marlay's application was allowed to stand until this day.

Stanley, Q.C., for C. B. Marlay:—

The policies cannot be applied in payment of the general creditors of Francis D. Reynolds, because they are in the hands of his administratrix impressed with a trust in favour of the mortgagor William Fetherstonhaugh, jun., save to the extent to which they shall actually be applied in satisfying the bond. William

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M'MAHON *v.* FETHERSTONHAUGH.

Fetherstonhaugh, jun., is entitled to have the policies applied in satisfaction of the bond, or so far as they may not be so applied, to have them re-assigned to him. The rule in *Ex parte Waring* (1) is applicable. The principle of that rule is laid down by Cotton, L. J., in *Ex parte Dever* (2), as follows (p. 623) :—"As I understand the principle of the rule it is this—the Court finds in the hands of a bankrupt certain property, which has been remitted to him by another person also become bankrupt to secure him against a liability which he has undertaken upon bills drawn on him by that person. The property cannot be applied in paying the general creditors of the acceptor, because it was in his hands impressed with a trust; nor can it go to pay the general creditors of the drawer, because he was not entitled to have it back without meeting the acceptances. The Court thereupon applies the property in such a way as will carry out as far as possible the equities between the two estates, *i.e.* in paying the acceptances to cover which it was sent." See also the judgment of Lord Selborne, L.C., in *The Royal Bank of Scotland* v. *The Commercial Bank of Scotland* (3). The case of *Maure & Harrison* (4) is also an authority in favour of the application.

O'Connor, Q.C., for the defendant :—

The deceased held the policies to secure him against liability on foot of his bond. The bond-holder has proved on the assets for the full amount. It matters not that the assets only suffice to pay a dividend. The estate is damnified to the amount proved for, and the equity to redeem does not arise till the full damage is made good. There seems to be no decision in point, but see de Colyar on Guarantees (2nd ed.), p. 275. *Ex parte Waring* (1) has no application. [He cited *Loder's Case* (5), and *Ewart* v. *Latta* (6)].

THE VICE-CHANCELLOR :—

These policies of assurance were assigned to Reynolds solely by way of indemnity against any loss which Reynolds might

(1) 19 Ves. 345.
(2) 14 Q. B. Div. 611.
(3) 7 App. Cas. 366.
(4) 1 Eq. Ca. Ab. 93, pl. 5.
(5) L. R. 6 Eq. 491.
(6) 4 Macq. H. L. C. 983.

sustain by reason of his having given his bond for £1000 to Marlay as a surety for Fetherstonhaugh. When, therefore, Reynolds' estate was released from liability on account of this bond, whether the liability was discharged by a payment in full or by a payment in part only, the policies reverted to Fetherstonhaugh, for they were held by way of indemnity only against this sum of £1000.

Solicitor for C. B. Marlay: *J. M. Ross Todd.*
Solicitor for the defendant: *Joseph E. Mac Dermott.*

D. M'C. M.

BYRNE *v.* WHITE.

(1894. No. 998.)

Creditor's suit for administration—Tenancy in lands—Ejectment by landlord for non-payment of rent—Liberty to plaintiff to redeem in the name of personal representative.

On a creditor's summons for administration of an intestate's estate, where part of the assets consisted of chattel tenancies in land, possession of which had been recovered by the landlord for nonpayment of rent, the Judge, on making the primary order, gave, under the circumstances of the case, liberty to the plaintiff to redeem, and for that purpose to use the name of the defendant, the personal representative.

ORIGINATING SUMMONS for the administration of the personal estate of James L. White, deceased.

The plaintiff was a creditor of the deceased, and on the 1st November, 1893, he recovered judgment against the defendant as his administrator, and subsequently lodged a writ of *fi. fa.* with the sheriff.

Part of the assets consisted of a mill and farm held under leases for years. The plaintiff made every effort to see the leases, but was unable to do so, and he did not know whether there was any clause in them of which a sale under the *fi. fa.* might be a breach.

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BYRNE v. WHITE.

The leases had been deposited by the deceased with the National Bank; but recently the landlord paid the amount due to the Bank, and took over the leases.

The defendant allowed the rent to fall into arrear, the landlord recovered possession in ejectment for non-payment of rent, and the time for redemption would expire on the 5th December, 1894. The plaintiff applied to the defendant to redeem, but he had not done so. The plaintiff also tendered the rent and costs to the landlord's solicitor, but he refused to accept the same. The plaintiff's solicitor wrote to the defendant informing him that the plaintiff was prepared to pay the rent and costs, and requiring the defendant to consent to this being done in his name; but no reply was received.

With the summons the plaintiff served notice on the defendant that he would on the hearing apply for leave to use the defendant's name in proceedings to redeem the lands.

P. A. O'C. White, for the plaintiff:—

The plaintiff as execution creditor merely is not entitled to redeem; and to preserve the assets it is necessary that he should have liberty to use the defendant's name for that purpose.

There was no appearance for the defendant.

THE VICE-CHANCELLOR made the usual order for administration, with the addition that the plaintiff should be at liberty to redeem the premises by payment of the rent and costs due to the landlord, and for that purpose to use the defendant's name; and declared the plaintiff entitled to a lien by way of salvage on the premises for the sum to be so paid by him with interest at £4 per cent. per annum.

Solicitor for the plaintiff: *William M. Byrne.*

D. M'C. M.

RENEWABLE LEASEHOLD CONVERSION ACT; EX PARTE QUINN.

V.-C. 1894. Dec. 3, 21.

(1894. No. 834.)

Lease and sub-lease for lives renewable—No contract by sub-lessor to procure renewals of lease—Rights of sub-lessee—Renewable Leasehold Conversion Act (12 & 13 *Vict*, *c.* 105), *s.* 14.

Where a lessee for lives renewable for ever makes a sub-lease for lives so renewable, there is, in the absence of a contract to procure renewals, no equity entitling the sub-lessee to compel his lessor to procure renewals for the purpose of feeding the sub-lease.

Section 14 of the Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105) is confined to cases where there is a covenant or other binding agreement sufficiently appearing upon the instrument, which creates an obligation upon the middleman to procure renewals. Accordingly, where there was no express contract on the sub-lessor's part to procure renewals of the lease under which he held, nor words from which any such covenant could be implied:—

Held, that that section did not apply, and that a petition presented by the sub-lessee, who had obtained a fee-farm grant, to compel his lessor to take out a similar grant, should be dismissed.

PETITION.

By lease of the 1st May, 1781, William Riall demised certain premises in Clonmel to Simmons Sparrow for lives with a covenant for perpetual renewal.

Simmons Sparrow's estate became vested in Richard Sparrow, and he by under-lease dated the 11th June, 1799, demised the said premises to Isaac Jacob for three lives, and for the lives and life of such persons and person as should from time to time for ever thereafter be added thereto pursuant to the covenant for perpetual renewal thereinafter contained, at the yearly rent of £52, payable half-yearly in every year during the continuance of that lease. Isaac Jacob thereby covenanted with Richard Sparrow for payment of the rent on the days and times thereinbefore mentioned and appointed for the payment of the same as aforesaid: Richard Sparrow covenanted that when and so often as any

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or either of the person and persons named as *cestui que vies* in those presents, or any other person or persons to be at any time or times thereafter nominated in their place or stead, or in the place or stead of any other person or persons to be thereafter nominated in any other or future lease of the said premises should happen to die, that he the said Richard Sparrow, his heirs, and assigns, should and would from time to time and at all times for ever thereafter grant a new lease or leases of the said premises to the said Isaac Jacob, his heirs, and assigns, for the life and lives of such of the *cestui que vies* as should be then living, and the life and lives of such other person and persons as should be by the said Isaac Jacob, his heirs, and assigns, from time to time for ever thereafter nominated and appointed to be put in the place and stead of such person and persons so happening to die, at and under the yearly rent and covenants in those presents contained, he the said Isaac Jacob, his heirs, and assigns, paying within six calendar months after the death of each of the said *cestui que vies* unto the said Richard Sparrow, his heirs, and assigns, 5*s.* 5*d.* sterling as and for a renewal fine, and paying all rent and arrears of rent that should be then due and owing, and nominating such life or lives: Isaac Jacob covenanted that he, his heirs, and assigns, should and would from time to time, and at all times thereafter during the continuance of that demise, keep in repair, &c., the said premises, and the same so repaired and kept, &c., should and would at the end, expiration, or other sooner determination of that demise yield and deliver up, &c.: Richard Sparrow covenanted for quiet enjoyment by Isaac Jacob, his heirs, and assigns, from time to time and at all times thereafter during the continuance of that demise; and the lease provided that Isaac Jacob, his heirs, and assigns, should and would from time to time, and at all times during that demise, uphold, clean, and repair a certain quay at the back of the demised premises.

The estate of Isaac Jacob became vested in David Malcomson and he by sub-lease dated the 12th day of April, 1819, demised to Thomas Greer portion of the said premises for three lives and for the life and lives of such other person and persons as should from time to time for ever thereafter be added thereto pursuant to the covenant for perpetual renewal thereinafter contained, at

the yearly rent of £26, and the lessor covenanted that when and so often as any or either of the person and persons named as *cestui qui vies* in those presents, or any other person or persons to be at any time thereafter nominated in their place and stead, or in the place or stead of any other person or persons to be thereafter nominated in any other or future lease of the said premises should happen to die, that he the said David Malcomson, his heirs and assigns should and would from time to time and at all times for ever thereafter grant a new lease or leases of the said premises to the said Thomas Greer, his heirs and assigns, for the life and lives of such of the *cestui que vies* as should be then living, and for the life and lives of such other person and persons as should be by the said Thomas Greer, his heirs or assigns, from time to time for ever thereafter nominated and appointed to be put in the place and stead of such person or persons so happening to die, at and under the yearly rents and covenants in those presents contained, he the said Thomas Greer, his heirs and assigns, paying within six calendar months next after the death of each of the *cestui que vies* unto the said David Malcomson, his heirs or assigns, 5*s.* 5*d.* sterling as and for a renewal fine, and paying all rent and arrears of rent that should be then due and owing, and nominating such life or lives.

The estate of David Malcomson became vested in William Malcomson, and that of Thomas Greer became vested in Frederick J. Quinn; and the lives in the sub-lease of the 12th April, 1819, having fallen in, William Malcomson on the 30th December, 1881, executed a fee-farm grant under the Renewable Leasehold Conversion Act (12 & 13 Vict., c. 105) to Frederick J. Quinn of the premises comprised in that sub-lease at the yearly rent of £24 present currency.

William Malcomson's estate became vested in Mary E. Pim. The lives in the under-lease of the 11th June, 1799, had fallen in and Frederick J. Quinn by notice dated the 21st July, 1894, called upon Mary E. Pim to procure a grant under the said Act in lieu of the under-lease of the 11th June, 1799, and requiring her within one calendar month to state whether she would comply with the notice or disputed his right to require her to procure the grant.

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The estate of Simmons Sparrow which had been by fee-farm grant dated the 19th June, 1878, converted into a perpetuity was by deed dated 30th January, 1894, conveyed to Frederick J. Quinn, and he was the proper person, and was willing to execute the grant to Mary E. Pim.

Mary E. Pim not having taken out a fee-farm grant, Frederick J. Quinn filed this petition under the Act to compel her to do so (1).

An affirmation of the respondent stated that her interest in the premises was very small, and it would not be worth her while to take out a fee-farm grant; the premises were very old, and the portion not let to the petitioner was held by two tenants from year to year who paid a yearly rent of £18 each. Their rents, with the £24 payable by the petitioner, amounted to £60, being £12 a year over the £48 (= £52 Irish) payable by her to the petitioner, and this profit rent was liable to taxes, rates, costs of repairs, and such like outgoings. The under-lease of the 11th June, 1799, had never been renewed, the petitioner had not been

(1) Section 14 is as follows:—"And be it enacted that where the owner of any under-lease in perpetuity is entitled to require the owner of the lease, or superior under-lease, out of which such first-mentioned under-lease is derived, to procure a renewal of such lease or superior under-lease, the owner of such first-mentioned under-lease may, at the time of requiring the owner of such lease or superior under-lease to execute to him a grant under this Act, and whether the time for the renewal of such lease or superior under-lease has or has not arrived, also require the owner thereof to procure a like grant to be made to such owner by the owner from whom he is entitled under this Act to require such grant; and where a grant has been made under this Act to the owner of an under-lease in perpetuity entitled to require the owner of the lease or superior under-lease in perpetuity, out of which such first-mentioned under-lease was derived, to procure a renewal of such lease or superior under-lease, and the owner to whom such grant has been made has not at the time of requiring such grants required the owner of such lease or superior under-lease to procure a like grant to be made to such owner, and such grant has not in fact been made to such owner, the owner of the estate into which the estate under such first-mentioned under-lease has been converted shall, at the time when he might, if such last-mentioned estate had not been converted, have required the owner of such lease or superior under-lease to procure a renewal thereof, be in like manner entitled to require such owner to procure a grant to be made to him under this Act."

disturbed in his possession, and could not be so, whether the respondent's interest was determined or not, having regard to the fact that the estate created by the lease of the 1st May, 1781, had been converted into a fee, and that the same was vested in the petitioner himself. Until the petitioner purchased the interest under the grant of the 19th June, 1878, he never required the respondent or William Malcomson to procure a renewal of their lease or to convert their estate into a fee, and the respondent submitted that the real object of the petition was, not to feed the grant to the petitioner, but to force on the respondent a personal covenant for payment of the £48 a year in perpetuity.

Edge, Q.C. (with him *M. B. Cooper*) in support of the petition:—

Though there is no express covenant by the lessor in the sub-lease of the 12th April, 1819, to obtain a renewal of his own lease of the 11th June, 1799, there is sufficient from which to imply such a covenant; and even if this were not so, on the principle that a person cannot derogate from his own grant, the respondent is bound to obtain an estate to feed the interest created by her predecessor. See Lyne on Leases for Lives, 129, 130. A Form of bill by a sub-tenant against the head landlord, is given in Burroughs and Gresson's Irish Equity Pleader page 246. See also Furlong, Landlord and Tenant, 2nd ed., 277, 278. Even if there were no express or implied covenant by the lessor in the lease of the 12th April, 1819, to obtain a renewal, the right of the petitioner according to the old equity in this country is sufficient to bring the case within section 14, of the Renewable Leasehold Conversion Act. The absence of authority on the subject is not against the petitioner, as up to recently leasehold interests were valuable and middlemen did not refuse to renew. See however, *Roberts* v. *Mayne* (1) for a precedent of a cause petition for that purpose. The petitioner cannot himself apply for a grant from the head landlord because the sub-lease comprises portion only of the premises demised by the lease of the 11th June, 1799, and a grant in lieu of the latter should include all the premises demised by it,

(1) 7 Ir. Ch. R. 551; 8 Ir. Ch. R. 525.

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in part of which the petitioner has no interest as sub-lessee under the sub-lease of the 12th April, 1819. The petitioner, in his capacity as head landlord, is the person to make the grant to the respondent, he is ready to do so, and that removes all difficulty.

Further the petitioner as the respondent's landlord is entitled to compel her to renew. The provisions of the lease of the 11th June, 1799 amount to a covenant by the lessee to accept renewals. See *Furnival* v. *Crew* (1), *Brown* v. *Tighe* (2), *Ward* v. *M'Roberts* (3). Previous to *Watson* v. *Watson* (4), it was understood that a fee-farm grant under the statute conferred the legal estate on the grantee whoever he might be, although he had previously no estate, legal or equitable, might *e. g.* be a guardian of a minor or committee of a lunatic; but that case decided that the statutory grant operated as a parliamentary conveyance of the legal and equitable interests in the fee, to the persons who were respectively entitled to such interests in the lease immediately before the conversion; and the Master of the Rolls clearly intimates in his judgment that the burden of the covenants entered into by the grantee is similarly distributed to the estate. It would in fact be absurd to suppose that a grantee who retained no estate was to be left liable to covenants to pay rent and keep in repair. The effect of this decision is that the respondent by taking out a grant in lieu of the lease of the 11th June, 1799, will only be subject to the covenants for the payment of rent and repair under the grant, to the same extent, *and no more*, as she was previously liable to the same covenants under the lease; and as she was only liable under the lease, as an assignee and not as original lessee, so under the grant she could not be held liable to a further extent, though in form she covenanted as an *original* grantee; and so any argument that the taking out of a grant, by the respondent, would impose a perpetual liability on her, falls to the ground.

[Counsel also referred to *Curry* v. *Stanley* (5), and *Pilson* v. *Spratt* (6).]

(1) 3 Atk. 83, 87.
(2) 8 Bli. N. S. 272, 291.
(3) 25 L. R. Ir. 224.
(4) Ir. R. 11 Eq. 523.
(5) H. & J. 487.
(6) 25 L. R. Ir. 5

Matheson, Q.C., and *Wakeley*, for the respondent:—

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From the time that the petitioner obtained his own grant in 1881, to the present year, he never thought of applying to the respondent to take out a superior grant. It was only after he had acquired the head interest in January, 1894, that he stirred in the matter. The respondent has very little profit rent out of the premises, which are old and out of repair, and bad security for the petitioner's rent. The petitioner's object is to obtain further security for his rent, and by forcing the respondent to take out a grant from him, to compel her to enter into a personal covenant for payment of the rent. The petition is not *bona fide;* the petitioner is seeking protection against himself, as he could not under the circumstances be disturbed in his possession. Irrespective of the foregoing matters the petitioner is not entitled to the relief sought. The petition is framed under the Renewable Leasehold Conversion Act, but that statute does not give him the right he claims. The first section of the Act deals with leases and under-leases containing the ordinary covenant by the lessor to renew, but section 14, under which the petitioner claims, deals with a more limited class of under-leases, viz. those in which there is not merely the ordinary covenant to renew, but also a covenant by the under-lessor, to procure a renewal of his own lease. The opening lines of the section govern the entire of it, and limit its operation to cases in which the under-lessee is entitled to require his landlord to take out a renewal. If it had been intended that every under-lessee was to be entitled to require his lessor to procure a grant, section 14 would have been in the same general terms as section 1. The petitioner must satisfy the Court that he is a person entitled to require the respondent to procure a renewal of the lease of 1799. The old equity of a sub-lessee was to require either that his immediate lessor should procure a renewal from the head landlord or, if the mesne landlord declined to do so, that a renewal of the head interest should be made to himself direct. See a form of prayer to this effect in Burroughs and Gresson's Irish Equity Pleader, p. 254. There is no authority for the petitioner's contention. No case is reported in which a middleman has at the instance of his sub-lessee been ordered to procure a grant under

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the Act, or before it a renewal, where the sub-lease contained only the ordinary covenant to renew.

The principles stated in Lyne on Leases for Lives, pp. 129, 130, apply to this case, and the petitioner's only remedy would be an action for damages if the respondent allowed a forfeiture to take place. In *Davis* v. *Hone* (1), the judgment in which (p. 348) is referred to by Mr. Lyne, p. 129, there was a covenant to procure a renewal acted on for 150 years, and section 14 would apply to such a case. So in *Lord Frankfort* v. *Thorpe* (2) where there was a similar covenant; and in *Barrett* v. *Burke* (3) in which the decrees were reversed by the House of Lords, the middleman had covenanted to procure a renewal. The passages in Furlong, Landlord and Tenant, 2nd ed., p. 277, do not carry the petitioner any further; the author cites among other cases that of *Revell* v. *Hussey* (4) in which there was a covenant to obtain a renewal.

The statements in the text books are all founded on cases in which there were covenants by the sub-lessors to use their best endeavours to procure renewals. In *Roberts* v. *Mayne* (5) the question was whether the covenant in the lease was one for perpetual renewal; that case has no application to the present.

It is next argued that the petitioner as head landlord is entitled to compel the respondent to take out a renewal; but such is not the frame of the petition, and moreover a petition under the Act would not be the proper mode of enforcing such a right, which could only be done by action. But here the petitioner as landlord has no such right. In the case of *Ward* v. *M'Roberts* (6) in which the equity civil bill erroneously sought to compel the taking out of a fee-farm grant, but which was treated as a suit to compel a renewal, Monroe, J., held on the entire instrument that there was an implied covenant on the tenant's part to accept renewals. There is nothing similar here; all the covenants in the lease of 1799 refer to that lease only. *Watson* v. *Watson* (7) turned merely on the question in whom the estate was vested.

(1) 2 Sch. & Lef. 341.
(2) 2 Ball & B. 372.
(3) 5 Dow. 1.
(4) 2 Ball & B. 280.
(5) 7 Ir. Ch. R. 551; 8 Ir. Ch. R. [525.
(6) 25 L. R. Ir. 224.
(7) Ir. R. 11 Eq, 523.

Edge, *Q.C.*, in reply :—

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An express covenant to procure a renewal is not necessary. The preamble of the Act is quite general, and any old equity enabling a party to obtain a renewal gives him a right now to obtain a grant. In *Roberts* v. *Mayne* (1) the petition was against both head and mesne landlords. The passage in Lyne on Leases for Lives, p. 129, is quite general. The form in Burroughs and Gresson's Irish Equity Pleader, p. 246, deals with the case of a lease for lives with a simple covenant for perpetual renewal. *Ward* v. *M'Roberts* (2) was a case practically the same as the present. *Furnival* v. *Crew* (3) is a decision of Lord Hardwicke that a covenant by the lessor to execute one or more lease or leases upon payment of a certain fine at the death of the *cestui que vie*, "and so to continue the renewing of such lease or leases" amounts not only to a covenant by the lessor to renew, but also (the lease being executed by the lessee) to a covenant by the lessee to accept or procure a renewal. The fact relied on by the respondent that the petitioner occupies the two positions of being the head landlord and also the sub-lessee does not necessarily render the taking out of a grant by the respondent, who has the middle interest, unnecessary, as it would be unfair to ask the petitioner in his capacity of head landlord to accept a surrender of the respondent's middle interest, the respondent having by her own showing allowed the premises to fall out of repair, and violated her covenant to keep them in repair, the premises being buildings in a town. If this were so the respondent would be allowed to take the advantage of her own breach of covenant and permissive waste. At the same time, from the decision in *Watson* v. *Watson* (4), it is submitted that the respondent would be bound by the covenants in the grant only to the same extent as she was previously bound by the covenants in the lease.

THE VICE-CHANCELLOR :—

Dec. 21.

This petition has been filed to compel the respondent Mrs. Mary E. Pim to take out a fee-farm grant of certain premises in

(1) 7 Ir. Ch. R. 551 ; 8 Ir. Ch. R. [525.
(2) 25 L. R. Ir. 224.
(3) 3 Atk. 83, 87.
(4) Ir. R. 11 Eq. 523.

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the town of Clonmel, for the purpose of feeding a sub-fee-farm grant of those premises made by William Malcomson, whose estate and interest in the premises are now vested in her. The titles of the several parties may be briefly stated as follows:— In the year 1781 a lease for lives with covenant for perpetual renewal was granted to a person named Sparrow by the owner in fee-simple. Sparrow's interest became vested in a person named Graham, who obtained a fee-farm grant under the statute, dated the 18th June, 1881, from the owner in fee. The petitioner purchased Graham's interest, and it was conveyed to him by deed, dated the 30th January, 1894.

In the year 1799 Sparrow made a sub-lease for lives with covenant for perpetual renewal to a person named Jacob. Jacob's interest in this sub-lease became vested in William Malcomson, and Malcomson's interest became and is now vested in the respondent. It is this interest which the petitioner seeks to have converted into a fee-farm.

In the year 1819, Malcomson made a sub-lease of portion of the premises, also for lives with covenant for perpetual renewal to a person named Greer which became vested in the petitioner. The petitioner obtained a conversion of this interest into a fee-farm under the Act by deed of 30th December, 1881, from Malcomson. Thus the relative positions of the parties are that the petitioner is seized for an estate in fee-farm, directly under the fee-simple, the respondent is his tenant of the same premises under a lease of lives with covenant for perpetual renewal, and the petitioner is again seized of a fee-farm interest in a portion of the premises under the respondent. He now seeks to compel the respondent to take out from him as owner of the superior fee-farm interest, a grant in fee-farm in order to feed the sub-fee-farm interest which the respondent holds under the grant of the respondent's predecessor in title by the deed of 1881. The application is made under the 14th section of the Renewable Leasehold Conversion Act, which is as follows:—[His Lordship read the section.] The owner of the underlease, in order to avail himself of this provision, must be entitled to require the owner of the lease, out of which his lease is derived, to procure a renewal from his lessor.

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In the lease of 1819 from Malcomson to Greer, there is no express covenant on the lessor's part to procure renewals of the lease under which he held, nor are there, in my opinion, words from which any such covenant could be implied.

But it was contended by the petitioner that although the lease contains no such covenant, the lessor thereby contracted an equitable obligation to procure renewals which could be specifically enforced in this Court. I do not see how specific performance can be enforced unless there was a contract created by the lease to take out such renewals. No case has been cited to support this contention. There have been cases where a suit in equity has been maintained by the owner of a sub-lease or other under-interest, carved out of a superior underlease, against the superior landlord and the middleman, praying that either the middleman should take out a renewal of his lease, and thereupon grant a renewal to the under-lessee, or that, if he should not submit to do so, the superior landlord should be decreed to grant a renewal of the superior lease to the underlessee in trust to support his underlease. A precedent of a bill for that purpose is to be found in Messrs. Burroughs and Gresson's valuable book on Equity Pleading. An anonymous opinion is there given on this equity, which I mention as it expresses what I always considered to be the law on the subject:—"The bill (page 254) is filed on the principle stated by Mr. Lyne in his treatise on Renewals, 130, the cases of Revell *v.* Hussey, 2 Ball & B. 280, Davis *v.* Hone, and other cases, in which the principle seems admitted that if the immediate tenant has not forfeited the right of renewal but does not renew, the sub-tenant shall not be without remedy, but may file a bill to preserve his own interest, but in the alternative, as presumed in the draft of the bill in this case, so as to preserve the interest of the immediate lessee, if he wish to insist on it."

I apprehend that the decree in such a case was not, in the absence of contract, mandatory on the middleman to take out a renewal to himself, but merely in the alternative that he should do so, or, if not, that he should be precluded from objecting to the superior landlord making a renewal over his head to the undertenant. The decree in *Davis* v. *Hone* (1) referred to in that

(1) 2 Sch. & Lef. 341.

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opinion, and in Mr. Lyne's book, p. 129, was framed upon this principle. It went on to direct that in case the defendant Hone, who was the middleman, should refuse to accept the prescribed terms, and to permit the lease to be renewed in his name, and that such renewals should be obtained in the name of such trustee, the consideration of the question whether the defendant should be compelled specifically to perform the said covenants for renewal, &c., should be reserved. This reservation cannot be relied on as an authority for the petitioner's demand, because the question was not decided, and even if this reservation could be treated as an intimation of opinion, there was in that case an express covenant in the lease, on the part of Ussher, the middleman, whose estate and interest had become vested in Hone, to procure renewals of the head lease, and renew to Davis *toties quoties*.

There is a *dictum* of Lord Redesdale, in *Evans* v. *Walshe* (1), which tends in the same direction, that the middleman must renew on the old terms, unless he chose to abandon the property, and allow the sublessee to stand in his place for renewal; which as he had not covenanted to renew with the head landlord he might, perhaps, be at liberty to do.

The case of *Frankfort* v. *Thorpe* (2), referred to by Mr. Lyne, was also one of an ecclesiastical lease with a sub-lease containing a covenant by the lessor to endeavour to procure renewals to enable him to renew to the sub-lessee and to renew *toties quoties*, upon the sub-lessee paying to him a share of the renewal fines, it being the intent and meaning of the parties that the sub-lessee paying the rent and his share of the fines, &c., should have a lease for the renewed term. It was held by Lord Manners, L. C., that the terms of the sub-lease amounted to a covenant on the part of the sub-lessee to accept renewals *toties quoties*. There was no question there of an equity independent of contract, and there are no words in the case now before me similar to those from which Lord Manners spelled out a contract to accept renewals. The case of *Revell* v. *Hussey* (3), also before Lord Manners, has not much application to the present, as there were in that case express covenants in the

(1) 2 Sch. & Lef. 519. (2) 2 Ball & B. 372. (3) 2 Ball & B. 280.

superior and middle leases entitling the sub-lessee to renewal, and it only shows, so far as the question here is concerned, that the head landlord and middleman may be joined as defendants in a suit for renewal by the sub-lessee. I am of opinion that in the absence of a contract to procure renewals there is no equity arising which would entitle the sub-lessee to compel his lessor to procure renewals for the purpose of feeding his sub-lease. In this class of cases, and also in another class which was referred to in argument as analogous, where the question was as to the obligation of a lessee to accept renewals, the real question appears to have been whether a contract is created by the terms of the instrument in question. I was referred to the cases of *Curry* v. *Stanley* (1) in the Court of Exchequer, and of *Pilson* v. *Spratt* (2), and *Ward* v. *M'Roberts* (3), before Mr. Justice Monroe, but they do not appear to me to be authorities upon the question now before me, and in all of them the contention was whether a covenant by a lessee to accept renewals was created by the respective leases. I am of opinion that this is not a case within section 14 of the Renewable Leasehold Conversion Act. If the petitioner's contention is correct, that in all cases of leases for lives renewable for ever, out of which sub-leases or other derivative interests have been created, and independently of contract to that intent, the right here claimed must be deemed to exist, the section would not have been confined in its operation. The expression of cases where the owner is entitled to require is an exclusion of other cases where he is not so entitled, and therefore there must be cases where he is not so entitled, within the contemplation of that section. It seems to me to be confined to cases where there is a covenant or other binding agreement sufficiently appearing upon the instrument which creates an obligation upon the middleman to procure renewals.

The positions occupied by the petitioner have also been relied on in opposition to the present application. He is himself both the owner of the head fee-farm estate, and also the owner of the sub-fee-farm interest in respect of which he sues. Having acquired from the predecessor in title of the respondent an estate

(1) H. & J. 487. (2) 25 L. R. Ir. 5. (3) *Ibid.* 224.

V.-C. 1894. Ex parte QUINN.

in fee-farm under the Act, he now sues the respondent to compel her to take out a grant in fee-farm from himself as the superior owner. He wants in fact to be protected in his title against himself. No one else could interfere with his sub-grant in perpetuity. It certainly affords some ground for the allegation that he has an ulterior object in doing so, namely, to compel the respondent to take out a fee-farm grant from himself, not to perfect his own title, but to impose on her personal covenants creating a liability for ever to the rent and covenants contained in the lease to Jacob. No application was made by the petitioner for what he now seeks till after he obtained a conveyance from the representatives of Sparrow of the superior fee-farm estate in January last, though the sub-fee-farm grant was in existence since 1881.

I must dismiss the petition with costs.

Solicitor for the petitioner: *Arthur St. George.*

Solicitors for the respondent: *T. W. Hardman & Sons.*

D. M'C. M.

V.-C. 1894. Dec. 5.

MONCK *v.* SMYTHE.

(1894. No. 563.)

Practice—Leave to plead special rejoinder—Application for—Order XXIII., Rule 2.

An application for leave to plead a special rejoinder, under Order XXIII., Rule 2, should be made on notice.

William Moore, for the defendant, applied *ex parte* for leave to plead a special rejoinder. He stated that in the Common Law Divisions the application was so made.

THE VICE-CHANCELLOR said that the words of the Rule, "upon such terms as the Court or Judge shall think fit," showed that the application should be made on notice.

Solicitor for the defendant: *R. H. Beauchamp.*

D. M'C. M.

IN THE MATTER OF THE ESTATE OF HENRY A. KEOGH, OWNER; WILLIAM LEONARD, PETITIONER.

Monroe, J.
1894.

Oct. 30.
Nov. 8.

Bank—Security for future advances—Petition for sale by incumbrancer—Service of notice to lodge deeds—Appropriation of payments.

An owner deposited title-deeds with his bankers, by way of equitable mortgage, to secure past and future advances. A petition for sale having been presented by a subsequent incumbrancer, notice to lodge deeds was served by the petitioner on the Bank :—

Held, that the petitioner was entitled to priority over any advances made after service of the notice.

APPLICATION by the petitioner for an order declaring whether the alleged lien of the Ulster Bank, Limited, against the sum of £198 standing to the credit of the matter was a valid and subsisting lien against the fund or not? and if found to affect said fund, whether the same was in priority to the petitioner's mortgages, or either of them? and that the fund in Court might be allocated.

On the 28th March, 1892, a petition was filed in the matter of Henry A. Keogh, owner, William Leonard, petitioner, on foot of two judgment mortgages, both registered on the 21st March, 1892, for sale of certain lands known as Roscolvin and Narrabeg. The lands of Roscolvin were alleged to be held under a fee-farm grant of the 6th October, 1705; and the lands of Narrabeg under three separate instruments, viz. a lease of the 22nd April, 1796, for 999 years; 2, a fee-farm grant of the 25th November, 1798; and, 3, a lease of the 11th February, 1859, for a term of 100 years. An absolute order for sale of these premises was made on the 7th June, 1892. After the order for sale had been made, the petitioner discovered that the owner had surrendered the lease of the 22nd April, 1796, and that he was entitled only to five-thirtieths of the same lands as comprised in a fee-farm grant of the 10th April, 1714. On the 16th September, 1892, the same petitioner filed a supplemental petition for sale, under the partition Acts, of the entire interest under this fee-farm grant; and a stay was put on

Monroe, J. 1894.

In re KEOGH'S ESTATE.

the proceedings for sale of the owner's alleged interest under the lease of 22nd April, 1796. The owner of the other shares in the fee-farm grant showed cause against the conditional order, and offered to purchase the owner's shares at a valuation. This was agreed to; a valuation was made and confirmed, and the purchase-money was lodged on the 4th July, 1893. The present motion having been instituted for distribution of the purchase-money, the priority of the petitioner's claim was disputed by the Ulster Bank under the following circumstances:—On the 21st March, 1887, the owner deposited with the Bank two conveyances of the 25th February, 1868, and 6th March, 1876, being title-deeds affecting the lands of Narrabeg, including the fee-farm grant of the 10th April, 1714. The deposit was made to secure all past and future advances, and the Bank from time to time made advances thereon.

On the 15th February, 1893, a notice to lodge deeds entitled in the first petition was served on the Bank. Mr. Beauchamp the solicitor for the Bank undertook to lodge all deeds in his possession on getting an order preserving his lien. This order was obtained, and the deeds were duly lodged immediately after. At the date of the motion there was due to the Bank the sum of £102 1*s.* 7*d*, part of which amounting to £60 was secured by the owner's bill. A bill for £100 was given by the owner to the Bank on the 10th May, 1892, and was renewed from time to time down to the 18th February, 1893. The owner paid £20 and gave a renewal for £80 on the 18th February, 1893. On the 18th of August, 1893, when the bill became due, there stood to the owner's credit the sum of £24 3*s.* He gave a cheque on that date for £20, and a renewal for £60. The owner soon after drew out the £4 3*s.* standing to his credit, and subsequently from time to time renewed the £60 bill, the last renewal not maturing till the 18th December, 1894. The Bank made further advances, and now claimed priority both for the £60 secured by the bill, and the £42 1*s* 7*d.* due on the current account, alleging that no notice had been given of the petitioner's charges created by the two judgment mortgages of the 21st March, 1892, and that the Bank was therefore entitled to continue its advances.

There was due to the petitioner on foot of his judgment mortgages £362 1*s.* principal, and £17 17*s.* 9*d.* interest.

J. S. Edge, for the petitioner:—

In *O'Byrne's Estate* (1), it was held by Flanagan, J., and the Court of Appeal, that service on a Bank of the conditional order for sale made on an incumbrancer's petition was sufficient notice of the incumbrance to postpone subsequent advances by the Bank. The service of an order to lodge deeds is equally efficacious—even more so because it can only be made after the conditional order for sale has become absolute. It is true the order was entitled in the matter of the first petition only, but there was sufficient to put the Bank on inquiry: *Hopkinson* v. *Rolt* (2), *London and County Bank* v. *Ratcliffe* (3), *National Provincial Bank* v. *Jackson* (4).

On the 18th August, 1893, it was the duty of the Bank as regards third parties to apply any moneys of the owner in their hands to the payment of the £80 bill. At that date they had £24 3*s.* to his credit, all of which, and not merely the £20, should have gone in reduction of his indebtedness.

T. Pakenham Law, Q.C., for the Ulster Bank:—

We never had any notice of the petitioner's mortgages. He says that we might have found out the mortgages by making searches which we were not bound to make. The Bank had no power to apply the £4 3*s.* to the £80 bill. Cheques might be coming in. The £20 was paid by cheque.

At most the notice to lodge deeds was only constructive notice of the petitioner's mortgages. Actual notice was necessary to postpone the subsequent advances: see *per* Fitz Gibbon, L.J., in *O'Byrne's Estate* (5). But here there was not even constructive notice: *English and Scottish Mercantile Investment Trust* v. *Brunton* (6); 2 White and Tudor L. C. (6th ed.), page 56. In *The National Provincial Bank* v. *Jackson* (4) no question arose as to stopping advances. It was a question of notice in investigating title prior to making advances.

(1) 15 L. R. Ir. 189, 373.
(2) 9 H. L. Cas. 514.
(3) 6 App. Cas. 722.
(4) 33 Ch. Div. 1.
(5) 15 L. R. Ir. at p. 379.
(6) [1892] 2 Q. B. 1.

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Nov. 8.

MONROE, J.:—

[After stating the facts as already given said]—

The petitioner submits that the service of the notice to lodge deeds was notice to the Bank of the petitioner's claim, that the Bank had no right as against him after the said notice to make additional advances, and that when the bill became due on the 18th August, 1893, the Bank was bound to apply the £4 3*s.* standing to the owner's credit in reduction of that bill. He therefore says that the Bank's claim in priority to him is reduced to £55 17*s.*

It was not, and could not be, disputed that once the Bank had notice of the petitioner's charge any further advances must be puisne to that charge: *Hopkinson* v. *Rolt* (1). Neither was it disputed that if the Bank had been served with the conditional order for sale this was sufficient, and put the Bank on inquiry and bound it with notice of the several claims on the lands directed to be sold: *In re O'Byrne's Estate* (2). I am clearly of opinion that service of the notice to lodge deeds entitled in the matter of a pending petition was equally notice of the claims against the estate for sale. It is a stronger case than the service of the conditional order, as an order to lodge deeds can only be granted after the conditional order for sale has been made absolute. It threw on the bank before making further advances the duty of inquiring what were the lands for sale and whether there might not be charges which would be affected by further advances. No doubt the notice to lodge deeds was entitled in the matter of a petition which did not refer to the sale of the owner's interest under the fee-farm grant of 1714, but if it turns out on the investigation of the title that the owner's interest is wrongly described in the order for sale, it is a matter of course to amend it, assuming the petitioner has a right to sell. The supplemental petition in this case only became necessary, because the owner had merely certain shares in the estate, and he wished to proceed under the Partition Acts to sell the entire. A look at the petition would have shown the Bank that the petitioner was seeking to sell as a judgment mortgagee, and could sell any interest to which the owner was entitled. The petitioner is therefore entitled to priority over the sum of £42 1*s.* 7*d.*, advanced on

(1) 9 H. L. Cas. 514. (2) 15 L. R. Ir. 189, 373.

current account subsequent to the service on the 15th Feb., 1893, of the notice to lodge deeds. As regards the £4 3*s.* the petitioner cannot claim priority. No doubt when the bill for £80 became due on the 18th August, 1893, the Bank might have applied the whole of the £24 3*s.* to reduce that bill. This, however, was optional. The Bank was satisfied to take a cheque for £20, to renew for the balance of the bill, and leave the balance to credit. No further advance was made to the petitioner's prejudice. The Bank is entitled, as between them and the petitioner, when the money is distributed out of this fund in Court, to £60, and the petitioner is entitled to the balance.

Solicitor for the petitioner: *Malcolmson.*
Solicitor for the Ulster Bank: *Beauchamp.*

W. G.

DOYLE *v.* COYLE.

(1893. No. 917.)

M. R.
1894.
June 6.

Powers of appointment—Limited power—Alleged execution of power by will prior in date to settlement creating power—Wills Act, 7 Wm. 4 and 1 Vict. c. 26, ss. 24, 27.

The 27th section of the Wills Act (7 Wm. 4 & 1 Vict. c. 26) refers exclusively to general powers of appointment, and does not apply to limited or special powers.

Property comprised in a limited or special power of appointment exercised by will is not within the 24th section of the Wills Act, as being real or personal estate comprised in the will.

Dictum of Stirling, J., in *Re Wells; Hardisty* v. *Wells* (42 Ch. Div. 646) approved of. *Stillman* v. *Weedon* (16 Sim. 26) considered.

BY his last will dated the 31st August, 1885, William Burke appointed James Byrne and the plaintiff Laurence Doyle to be trustees and executors thereof, and, subject to a life estate thereby provided for his wife, he directed his said trustees to stand possessed of certain freehold premises in the city of Dublin in trust

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for his four daughters for life, giving to each of them specific interests in particular lands and premises; and after the decease of each daughter, respectively, then upon trust for her children as she should appoint, and in default of appointment in trust for her children equally. And as to all the rest, residue, and remainder of his property, the testator directed his trustees to stand possessed in trust for sale and conversion, and out of the moneys produced by the sale and conversion of the residue of his property (and of a certain house therein specifically directed to be sold), to pay his funeral and testamentary expenses and debts, and then directed the investment out of the residue of four sums of £1500 for the benefit of each of his four daughters, respectively, with a proviso that each bequest was to abate rateably in the event of the deficiency of his general assets. There was no residuary bequest contained in the will.

By indenture dated 26th October, 1888, and made between the testator William Burke of the one part, and Margaret Benedicta Burke, his wife, of the other part, the testator in consideration of his natural love and affection for his wife and children, conveyed to the said Margaret Benedicta Burke the several fee-simple houses and premises mentioned in the schedule to the deed (all of which were also referred to in the testator's will) to hold to the said Margaret Benedicta Burke in fee-simple to the use that she should, out of the rents and profits thereof, pay all taxes, &c., and premiums on policies of insurance against fire, and then to the use that she should out of the residue of the said rents, issues, and profits, clothe, support, educate, and maintain, in a manner suitable to his and their position in life, the said testator, and all the children of the said testator and the said Margaret Benedicta Burke; and, in the next place, to the use that she should retain the annual surplus that might remain over and above such payments for her own use and benefit, and subject thereto to such uses as might be declared by the last will and testament of the testator: but so that such uses should be for the benefit of the children of the said testator and the said Margaret Benedicta Burke. And it was thereby provided that the testator might at any time either wholly or partially revoke the uses and trusts thereby declared, and by the same or any other deed or deeds might appoint and

declare new or other uses, trusts, or powers concerning the same, but so that such new or other uses and trusts should be for the children or remoter issue of the said testator and the said Margaret Benedicta Burke, or in default of such children as therein.

Margaret Benedicta Burke died the 12th March, 1889, leaving the testator then living.

By indenture dated the 21st March, 1889, made between the testator of the one part, and the plaintiff Laurence Doyle of the other part, the testator thereby revoked the uses and trusts declared by the indenture of the 26th October, 1888, and, in pursuance of the power in that indenture contained, conveyed the same houses and premises to the said Laurence Doyle; to hold to him in fee-simple to the uses that he should, out of the rents, issues, and profits thereof, pay all taxes, charges, and impositions, and premiums on policies of fire insurance properly payable thereout, and then to the use that the said Laurence Doyle should, out of the residue of the respective rents, issues, and profits, clothe, support, educate, and maintain in manner suitable to their position in life, the children of the said testator by his said late wife, and invest the residue, if any, in authorized securities, and the resulting income thereof, but with power at any time to resort to accumulations and apply the same for the same purposes. And it was thereby declared that the said indenture of the 26th October, 1888, should be taken to be incorporated with and form part of the indenture now referred to, in so far that the same was not repugnant to anything contained therein.

By indenture dated the 27th July, 1892, the testator revoked the uses and trusts declared by the indenture of the 21st March, 1889, and thereby conveyed to the plaintiffs, Laurence Doyle, and Rev. Edward J. Burke (who had agreed to become trustee, jointly, with the said Laurence Doyle), all the before-mentioned houses and premises to hold in fee-simple to the uses and trusts declared and contained concerning the same by the indenture of the 21st March, 1889.

The testator died 24th April, 1893, without having made any will or other testamentary document subsequent in date to the trust deed of the 26th October, 1888, and without having purported to exercise the power of appointment reserved to him by said

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trust deed. Probate of his will was on the 27th July, 1893, granted to the plaintiff, Laurence Doyle, James Byrne the other executor named therein having duly renounced. And by deed dated the 2nd December, 1893, James Byrne disclaimed the trusts of the will. The testator left four daughters surviving him, the defendants Laura, Ellen, Mary, and Eva Burke. They were all under the age of twenty-one years at the date of the trial of the action.

The plaintiffs claimed:—1, To have the trusts of the several instruments hereinbefore mentioned declared, and, so far as may be necessary, carried into execution under the direction of the Court; and, 2, so far as may be requisite, to have the real and personal estate of William Burke, deceased, administered. The principal question argued at the trial of the action was whether the freehold hereditaments and premises comprised in the trust deed of the 26th October, 1888, were subject to the uses and trusts declared concerning the same by the last will of William Burke, though made and signed previously thereto, namely, on the 31st August, 1885.

It appeared from the affidavit of the plaintiff, Laurence Doyle, filed in the action that, on the assumption that the will of the testator did not operate as an execution of the power of appointment, and the children of the testator were held to take equally as tenants in common, in default of appointment, the two children Laura and Eva Burke would, respectively, receive less pecuniary benefits than if the will were held to be an execution of the power.

Shiel, for the plaintiffs.

Carton, Q. C. (with him *M'Cann*), for the minors Ellen and Mary Burke:—

On the main question whether the will of William Burke operates as an execution of the power of appointment contained in the deed of 26th October, 1888, we contend that it does not. *In re Wells; Hardisty* v. *Wells* (1) does not decide the net point at issue.

(1) 42 Ch. Div. 646.

What the Court was there asked to do was—to impute an intention to a testator to undo, by a previously executed will, what was done at a subsequent time by a settlement executed after the will in point of time. But the observations of Stirling, J., in the case, on the effect of sections 24 and 27 of the Wills Act, as regards general and limited powers of appointment, are strongly in favour of our contention. We submit that the Wills Act does not apply to limited powers in the same manner as to general powers of appointment: *Airey* v. *Bower* (1), *Boyes* v. *Cook* (2). These cases deal with general powers of appointment, and do not apply to limited powers. There does not appear to be any case where the operation of sections 24 and 27 of the Wills Act as regards general powers has been extended to limited powers: Farwell on Powers, 226.

Roche, Q.C., for Laura and Eva Burke:—

We submit that the will, though prior in point of date to the deed, is an execution of the limited power of appointment. The effect of the Wills Act in reference to powers of appointment cannot be confined to general powers of appointment, other things being equal. Here there is no "contrary intention" shown. The statute does not do away with any of the other tests to be applied to similar questions arising before the passing of the Act. The identity of the property comprised in the deed creating the power of appointment and the property disposed of by the will, even though no distinct reference is made to the power in the will, is a sure test that the intention is to execute the power by the will.

In *Stillman* v. *Weedon* (3) it was held that, under the combined operation of the 24th and 27th sections of the Wills Act (7 Wm. 4 & 1 Vict. c. 26), the will, though made before the power was created, was a good execution of it. That was the case of a limited power of appointment, and it was there objected that the power referred to in the 27th section of the Act was a general power; and the Vice-Chancellor says (p. 31), "I do not think it is."

As regards the particular will of this testator, he knew the property he was disposing of, and he shows an intention to execute the power of appointment by reference to the property which was

(1) 12 App. Cas. 263. (2) 14 Ch. Div. 53. (3) 16 Sim. 26.

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the subject of the power. The will in this case "comprises" the property subsequently "comprised" in the settlement and made the subject of the power. The case comes within *Stillman* v. *Weedon* (1); Shelford Real Property Statutes, 429.

M'Cann, in reply.

THE MASTER OF THE ROLLS:—

In this case I do not entertain any doubt sufficient to induce me to postpone my decision upon the only question now ripe for determination, namely, whether the will of the testator, dated 31st August, 1885, is an execution of the power of appointment contained in the voluntary settlement subsequent to it in point of date; because it is conceded that, if the will is not an execution of that power, the estate now belongs to the objects of the power in equal shares and proportions, on the well settled principle of *Brown* v. *Higgs* (2) and that class of cases.

The power of appointment is contained in the deed of 1888, which is carried on, by reference, into the other two settlements of 1889 and 1892, both of which are in substance, as they were described by counsel, little more than appointments of new trustees. The will, which is dated 31st August, 1885, does not contain any residuary bequest; and by it the property of the testator is devised to his four daughters. By it he gives to each of them specific interests in particular lands, and then directs the investment of four sums of £1500 for the benefit of each of them respectively with a proviso that each bequest is to abate rateably in the event of the deficiency of his general assets. There is as I have said no residuary bequest, probably because the testator knew or expected that his estate would be exhausted by the bequests in his will. By the deed of 1888 he conveyed to his wife, the "several fee-simple houses and premises mentioned in the schedule" to hold in fee-simple to the use that she should out of the rents and profits pay taxes, charges, and premiums on policies of insurance against fire, and support and maintain the children, retaining the annual surplus remaining after such payment for her own use and benefit, and

(1) 16 Sim. 26. (2) 8 Ves. 561.

subject thereto to such uses as might be declared by his last will, but so that such uses should be for the benefit of his children. The word "may" which is used in the will ("such uses as *may* be declared") imports futurity, though no doubt it is not a very emphatic way of embodying that idea, and might be applicable to an existing will. Still the language used would lead one to suppose that he intended a will to be made after the date of this deed. It may be that when he executed this voluntary settlement the testator had the fact before his mind that he had already made a will, and he may have thought that it would operate in conjunction with the settlement, so far as it was consistent with it. That is not an impossible suggestion. But probability, apart from the language used, cannot be the test where the instrument creating a power of appointment contemplates a particular mode of execution. The test is (apart from the question raised upon the provisions of the Wills Act) was it the intention of the testator, to be gathered from his will of 1885, to execute a power of appointment created by a settlement which was not executed in fact till 1888? That supposition is on the face of the instrument contrary to all probability. It is almost impossible to infer that he could have anticipated in making his will the execution of a power to be afterwards contained in and created by a deed not in existence, and to the possible existence of which no reference is contained in the will. Mr. Roche refers to a class of cases where a will, though making no direct reference to a power of appointment, has been assumed to refer to the power itself as indicating that that assumption will be satisfied if it be shown that the property comprised in the deed creating the power, and that dealt with in the will, are the same. And no doubt this principle is, as a general rule, right, because, when a testator without referring to the deed which creates a power disposes of property which, apart from the power, he cannot dispose of, the intention of exercising the power must be imputed to him, since otherwise the disposition would not take effect at all, and he must be supposed to know this. The identity of the property is thus a sure test in an ordinary case, that is, when the will follows the date of the instrument creating the power. But when the dates are transposed, when the deed containing the power is subsequent to the date of the will alleged to be an

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execution of it, the reasoning does not apply, bearing in mind that when he made the will the property was his own to deal with as he chose.

But then it is said that the Wills Act makes a difference: and the sections relied on are the 24th and 27th taken together. The 27th section provides:—"That a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate or any real estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." Now, rightly or wrongly this section has been always held, except perhaps in the case of *Stillman* v. *Weedon* (1), to refer exclusively to a general and not to a limited power, by force of the words "in any manner he may think proper": words which have never been treated as confined to the formalities by which the power is to be exercised, but to extend also to the objects of it. The section refers to any general power of appointment vested in the testator; and that reasonable construction was put upon it in *Airey* v. *Bower* (2), the principle which results from this construction being that where the testator has a general power of appointment, unlimited as to its objects, the property is to be dealt with as if it were his own. A general power of appointment is, for this purpose, treated as the same thing as property. Starting, then, with the 27th section so construed, we then come to the 24th, which is as follows:—"And be it further enacted, that every will shall be construed, *with reference to the real estate and personal estate comprised in it*, to speak and take effect as if it had been executed

(1) 16 Sim. 26. (2) 12 App. Cas. 263.

immediately before the death of the testator, unless a contrary intention shall appear by the will." Now, in cases where there is a general power of appointment, and where, therefore, under the 27th section, the property comprised in it is to be dealt with for the purposes of the Act as the property of the testator, it follows that such property is "the real or personal estate" *comprised in* the will; and then the Act provides that the will shall "speak and take effect as if it had been executed immediately before the death of the testator," unless a contrary intention appears by the will; and such appears to be the reasoning on which all the cases have proceeded. But how can this reasoning be applied in the case, not of a general, but of a special and limited, power of appointment? There is nothing in the 27th section which makes such a power the "property" of the testator for any purpose, or classes it with his real or personal estate. Is it, then, within the 24th section, as being real or personal estate "comprised in" the will? It is elementary learning that an instrument executing a power of appointment is to be read into the instrument creating it as if it were part of it; and granting that the 24th section makes a will executed before an instrument creating a general power an execution of such power, the section has no application to a limited power. The only case bearing directly on this question is that of *Re Wells* (1); and although it is not an actual decision on this point, it contains the opinion of Stirling, J., on the subject quite in accordance with the view I have expressed. *Stillman* v. *Weedon* (2), to which I have already referred, was an extremely curious case. There were there two powers of appointment, the first being a general power; and then, in default of the execution of the general power, the property was subject to a limited power of appointment with remainder over. The second power was the limited one, and the Vice-Chancellor came to the conclusion that a prior will was an execution of the second or limited power; and the case would, no doubt, be an authority in point if it is correctly reported, and would be contrary to the opinion of Stirling, J., in *Re Wells* (1). But if it be correctly reported, and if it was a decision on the point in question, I should decline to follow it, because it proceeds on a basis contrary to the views of all the

(1) 42 Ch. Div. 646. (2) 16 Sim. 26.

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judges who have since considered the question; for the Vice-Chancellor said at the close of the case that he did not think that the 27th section is limited to general powers of appointment; and there is no modification of this statement in his considered judgment given afterwards. If this is so the decision proceeded on what I am clearly of opinion was an erroneous basis, and must therefore be held to be inaccurate.

I am of opinion that the will of 1885 was not intended to operate, and does not operate, as an exercise of the power of appointment created by the settlement of 1888.

Solicitor for the plaintiffs: *G. D. Clancy.*
Solicitors for the defendant Coyle: *Baker & Ringwood.*
Solicitor for the minor defendants: *M. C. O'Meara.*

R. W. L.

WYBRANTS *v.* MAUDE.

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(1894. No. 57.)

Portions—Younger children—Power to charge—"Tenant for life of lands"—Tenant for life of undivided moiety—Exercise of power—Selection—Exclusive appointment—37 & 38 Vict. c. 37.

By his will, executed in 1869, a testator devised his real and freehold estate to M. and B. (two married female relatives) in such terms as to constitute each of them tenant for life of an undivided moiety of the estate, with remainder, as to the share of each, to her first or other son in tail male, and in default of such issue of either, then to the survivor, with remainder to her first or other son in tail male. Then, "as to the entirety of said real and freehold estate on failure of all the limitations hereinbefore expressed," the testator gave and devised his said real and freehold estate to H. for her life, and after her death to her son C. for life, with remainder to his first or other son in tail male. In default of such issue there followed similar limitations in succession, as regards the whole real and freehold estate in favour of the other sons of H. living at testator's death for life, with remainders to their respective first or other sons in tail male. There were similar remainders in favour of the sons of X. for life and their respective sons in tail male. On the failure of the issue of such persons the testator provided that the estate should go back to the female line, with limitations in tail to the daughters of M. and B., with

cross-remainders; and then there were remainders to the daughters of H. and the daughters of X. There was an ultimate remainder in fee to the testator's own right heirs.

Testator devised his lands and tenements held for terms of years to trustees, to pay rents, &c., and subject thereto upon trust to permit the same to be enjoyed as nearly as the difference of tenure and the rules of law would allow, according to the limitations and provisions declared of his real and freehold lands. The testator provided that every tenant for life in possession should have the power of charging £300 as a jointure for his wife. The will then provided as follows:—"I also empower every tenant for life of my lands and tenements, whether freehold or chattel, when in possession under the foregoing limitations, by deed or will, to charge same with any sum or sums of money not exceeding in the whole by any one tenant for life the sum of £5000, for the portion or portions of his younger child or children, and payable at such time or times as he or she shall appoint, and to create terms of years for securing same, with interest, &c., from the day of the decease of such tenant for life." Testator then empowered "every such tenant for life when in possession" to demise by lease all or any part of his real, freehold, and leasehold estates, for certain terms of years specified in the will. There was a "name and arms" clause contained in the will. As to his residuary estate, after payment of legacies, the testator directed his trustees to invest the same, pursuant to provisions for investment contained in the will, and then to hold the same in trust for the same purposes and uses, and as far as the rules applicable to personal property would allow, for the same persons, and according to the same limitations, as were provided concerning his real and freehold estate.

The testator died in 1875, at which time B. was a widow, with two daughters only. By deed, dated the 27th September, 1875, she charged her moiety of the "lands, tenements, hereditaments, and chattels," bequeathed to her for life by the testator, with the sum of £5000, for the portions of her two children and the survivor of them, to be paid to them or her after her own decease. There was a power of revocation contained in the deed.

Subsequently B. married P. W., and by deed poll, dated the 17th April, 1877, revoked the previous appointment or charge in favour of the children of her first marriage, and thereby appointed to E. (daughter and only child of her second marriage) the sum of £5000, and thereby charged the same on the undivided moiety, of which she was tenant for life, in the houses, lands, and premises (which were then set out, and consisted of freehold estate, or lands, houses, and premises held for terms of years), ". . . together with all other lands, hereditaments, and premises of which the testator was seized, possessed of, or otherwise entitled to, and devised by the said will," with the sum of £5000, to be paid to E. after her own (B.'s) death.

B. died in 1883, having survived her second husband. She left no male issue, and M. entered into possession as tenant for life of the whole estate. In 1894 E., by her next friend, issued a summons, claiming to be declared

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entitled to the sum of £5000, as appointee under the deed poll of 1877, and under the will of the testator:—

Held, 1, that, under the provisions of the will, B., as tenant for life in possession of the moiety of the lands, etc., devised to her by the testator, had power to charge the same with a sum of £5000 in favour of her children.

2. That she had power to appoint, in unequal shares or exclusively in favour of one or more child or children, such sum or sums not to exceed in the whole £5000.

3. That under the deed of 1877 there was a valid appointment of the sum of £5000 in favour of E., and that, under the terms of the deed, one undivided moiety of the lands, hereditaments, and premises of the testator, including the chattels real, and excluding the purely personal estate, were subject to the charge.

By his will, dated the 16th December, 1869, Robert Wybrants, of Rutland-square in the city of Dublin, after devising certain premises to his wife, and bequeathing an annuity to Mrs. Mary Anne Middleton, devised all his real and personal estate, and all lands and tenements of which he was possessed for terms of years whether in possession, reversion, or remainder, in the manner following:—As to his real and freehold estate he devised the same to his cousins Isabella Middleton and Georgina Battersby (wife of Thomas George Battersby) in equal shares for their respective lives, and as to the share of each on her decease to her first and every other son, successively, according to seniority of birth, and the heirs male of the body of each such son; and in default of such issue to the other of them the said Isabella and Georgina for the same estate for life, and with the same subsequent limitations as were therein expressed concerning her original share; and as to the entirety of said real and freehold estate on failure of all the limitations thereinbefore expressed he then gave and devised all his said real and freehold estate to his cousin Augusta Higginbotham, formerly Dawson, wife of Lieutenant-Colonel Higginbotham, and her assigns, for and during the term of her natural life; and from and after her death he devised the same to her son Charles Higginbotham and his assigns for life, and on his decease to his first and every other son, successively, according to seniority of birth, and the heirs male of the body of each such son, and on failure of such issue he devised the same to William Higginbotham for life with similar remainder to his first and every other son; and in default of such issue to every subsequent son of the said

Augusta Higginbotham, living at the testator's death for life, with remainder to his sons in tail male in succession, and on failure of such issue to the eldest son of the testator's cousin Louisa Maunsell, living at his death, for his life, with remainder in tail male to his sons; and on failure of such issue to the other sons of Mrs. Maunsell in succession for life, with remainder to their respective sons in tail male. The will then provided that on the failure of such issue the estate should go back to the female line with limitations to the daughters of Mrs. Middleton and Mrs. Battersby as tenants in common, and the heir and heirs of their respective body and bodies with cross-remainders between them; and on failure of such issue there were then similar remainders to the daughters of Mrs. Higginbotham; and on failure of such issue similar remainders to the daughters of Mrs. Maunsell with an ultimate remainder to the testator's own right heirs for ever.

The testator bequeathed his lands and tenements held for terms of years to the defendants Maurice Maude and Gustavus Wade, their executors, administrators, and assigns, upon trust to pay the head rents payable for same, and in case of renewable leaseholds to keep the same renewed, with power for that purpose to raise the fines by mortgage, and subject thereto upon trust to permit the same lands and tenements to be enjoyed, as nearly as the difference of tenure and the rules of law would allow, according to the limitations and provisions thereinbefore declared of his real and freehold lands, but so that no chattel real should vest in any tenant in tail being a male unless he should attain twenty-one years of age, or, being a female, should attain that age or be married. The testator then provided that every tenant for life of his lands and tenements, whether freehold or chattel real, when in possession under the foregoing limitations, should have the power by deed or will of charging the same with £300 as a jointure for his wife, but so that if more than one the several jointures should not exceed in the whole the annual sum of £600. The testator then provided as follows:—"I also empower every tenant for life of my lands and tenements, whether freehold or chattel, when in possession under the foregoing limitations by deed or will to charge same with any sum or sums of money not exceeding in the whole by any one tenant for life the sum of £5000 for the

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portion or portions of his younger child or children, and payable at such time or times as he or she shall appoint, and to create terms of years for securing same with interest not exceeding 4 per cent. per annum from the day of the decease of such tenant for life." The testator then empowered every such tenant when in possession, and during the minority of any infant tenant for life or in tail empowered the trustees and executors of his will or their representatives or other the trustees or trustee for the time being of his will, to demise by lease all or any part of his real, freehold, and leasehold estates not situate in the city of Dublin for any term of years not exceeding twenty-one, and in case of property in the city of Dublin for any time not exceeding sixty-one years for the best rent without fine with proper provisions to enforce payment of the rent. The will also provided that any person (of a different name from Wybrants) who should become entitled as beneficial tenant for life or in tail in possession, under the limitations therein contained, to the testator's freehold lands, not being a married woman, or who should marry any female becoming so entitled, should within a time therein limited endeavour to obtain an Act of Parliament or license from the Crown authorizing such person to assume and use the name of Wybrants, either alone or in addition to his or her usual name (but so that the name of Wybrants should be the last and principal name), and the arms of Wybrants quartered with his or her family arms, and should on attaining such Act or license assume and use the name, surname, and arms accordingly; and then there followed a proviso for forfeiture in case of non-compliance.

As to his residuary estate, after payment of legacies, the testator directed his trustees to invest the same pursuant to the investment clause contained in the will, and then to hold the same in trust for the same purposes and uses, and as near as the rules of law applicable to personal property would permit for the same persons and according to the same limitations and subject to the same provisions as were thereinbefore contained concerning his real and freehold estate. The testator made a codicil to his will dated 19th January, 1872, increasing certain bequests to his wife, but not altering the dispositions contained in the will as to his real, leasehold, or residuary personal estate.

The testator died 28th August, 1875, and probate of his will and codicil was granted on 23rd September, following, to the defendants Maurice Maude and Gustavus Wade, the executors therein named.

At the time of the death of the testator, Mrs. Georgina Battersby was a widow with two daughters, issue of her marriage with Thomas George Battersby deceased. By indenture dated 27th September, 1875, Mrs. Battersby charged her moiety of the "lands, tenements, hereditaments, and chattels" bequeathed by the will of the testator Robert Wybrants, with the sum of £5000, for the portions of her two children, Charlotte and Ethel Battersby and the survivor of them, to be paid to them or her the day after the death of their mother, with interest at the rate of 4 per cent. per annum, and directed and appointed the trustees of Mr. Wybrants' will (who were parties to the deed) to levy the said sum of £5000 and to hold the same in trust for, and pay the same accordingly unto, Charlotte and Ethel Battersby and the survivor of them, and it was thereby declared that it should be lawful for Mrs. Battersby by deed to revoke the appointment thereby made, and again to exercise the power as provided by the will of Robert Wybrants. Subsequently Mrs. Battersby married Captain Phipson (who subsequently took the name of Wybrants in addition to his former one), and by deed poll dated 17th April, 1877, after reciting the charge of £5000 on her moiety of the lands in favour of her children, Charlotte and Ethel Battersby, and the power of revocation of the appointment contained in the deed of 1875, she revoked the appointment of the said sum of £5000 and the charge and direction made and given, and, in exercise of the power of appointment reserved, thereby appointed to her youngest child, Edith Phipson Wybrants, the sum of £5000, and thereby charged the undivided moiety of the lands to which she was entitled as tenant for life, with said sum of £5000, to be paid to her said child Edith, her executors, administrators, or assigns, on the day of her (the mother's) death, with interest at 4 per cent., and gave directions as to the raising and payment of the same by the trustees of the will of Mr. Wybrants or their representatives.

Mrs. Phipson Wybrants died on 11th October, 1883, having survived her husband, Captain Phipson Wybrants, who died in

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1880. She left no male issue, and, on her death, Mrs. Isabella Wybrants (formerly Mrs. Middleton) entered into possession as tenant for life of the whole estate under the provisions of the will. On 29th of January, 1894, the plaintiff, Edith Phipson Wybrants, by her guardians and next friends, issued a summons asking that her rights as appointee of the sum of £5000 under the will of Robert Wybrants and the deed poll of the 17th April, 1877, might be ascertained and declared, and that the said sum might be raised out of the moiety of the real and personal estate of Robert Wybrants bequeathed to Georgina Phipson Wybrants (formerly Battersby).

Twigg, Q.C. (with him *J. H. Shaw*), for the plaintiff in support of the application :—

1. Alike on the scheme of the will and on its construction it is manifest that the power to charge portions for younger children was intended to be given to the first objects of the testator's bounty, Mrs. Battersby (afterwards Mrs. Phipson Wybrants) and Mrs. Middleton. Even if each of these ladies was only tenant for life of a moiety of the lands, each was tenant for life of all the lands in common with the other. In order to support the contention of the other side the word "whole" must be inserted. Each lady was tenant for life of the lands in the ordinary acceptation of the term. The circumstances of the testator's property may be taken into consideration. There was a large and ample property, and it cannot be conceived that it was the intention of the testator to prevent the first objects of his bounty from providing for their daughters. "Younger" children in the case of such a provision contained in the will of a person who is *in loco parentis* means children other than those who take the estate.

2. On the construction of the will Mrs. Phipson Wybrants could exercise the power in favour of one child without giving anything to others. At all events the provisions of the will authorize her to give in unequal shares, and that being so the execution of the power is not invalid on the ground that any of the objects are altogether excluded. *Edwards* v. *Slater* (1), *Fenton* v. *Fenton* (2).

(1) Hardres' Reports, 410. (2) 1 Dr. & Wal. 66.

Consequently the appointment in favour of Edith Phipson Wybrants is valid, and she is entitled to the £5000 charged on the undivided moiety of the lands and tenements, freehold and chattel, of which her mother was tenant for life. Under the terms of the deed of appointment of 1877, the residuary estate is also subject to the charge. The power of leasing contained in the will presents no difficulty. It involved the joining of the two tenants for life of undivided moieties in making a lease.

Serjeant Jellett, Q. C., for Mrs. Higginbotham, appointed to represent the class of persons entitled in remainder after the determination of the life estate of the defendant Mrs. Wybrants (formerly Mrs. Middleton) :—

Mrs. Battersby had no power, under the provisions of the testator's will, to charge in favour of younger children. She was not tenant for life of all the lands. "Tenant for life of my lands" means "tenant for life of *all* my lands." The powers of leasing, portioning, and jointuring can only be exercised by a person who is tenant for life of the entirety of the lands. The whole sequence of limitations and powers follow the entire subject-matter. The contention of the other side comes to this, that the two ladies, who were each tenant for life of an undivided moiety, had power to charge in favour of children double the amount that a tenant for life of the whole of the lands could do. The testator in this case was not *in loco parentis*, and the interpretation put upon "younger children" in the case of a settlement by parent or person *in loco parentis* does not apply : *Lyddon* v. *Ellison* (1).

Law, Q. C., for the executors and trustees of the will, cited *Verschoyle's Trusts* (2).

Kenny, Q. C., for the defendants William and Isabella Wybrants :—

In the first place, under the will the testator deals with the shares of Mrs. Battersby and Mrs. Middleton, and then makes cer-

(1) 19 Beav. 565. (2) 3 L. R. Ir. 43.

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tain provisions as to the "entirety." The power to charge applies only to a tenant for life of the whole estate. Mrs. Higginbotham is the first person indicated by the will as the person having the power of charging. She fulfills the requirements of the clause. The construction which must be attached to the power of leasing throws light on the other question. The power of leasing contained in the will can only, from its nature, be exercised by someone who has come into possession of the whole estate.

Shaw, in reply:—

1. Mrs. Phipson Wybrants (formerly Mrs. Battersby) was entitled to charge her moiety with portions for her children. The phrase "entirety" is used as a convenient word for the purposes declared concerning the estate. The use of the term does not in any way show that the subsequent provisions in the will are applicable only to the whole estate. The circumstances of the testator, the extent of his property, and the provisions made, in the first place, in favour of Mrs. Middleton and Mrs. Battersby altogether negative the idea that neither of these ladies could have power to charge in favour of children. The existence of the leasing power contained in the will does not aid the construction contended for by the other side, as regards the power to charge. There is no reason why the power of leasing should not be conferred on the respective tenants for life of the moieties. Its exercise by either of them would be valid and legal. See section 19 of the Settled Land Act of 1882.

2. Under the terms of the will there is ample power of selection as well as of appointment among children, and therefore the statute (37 & 38 Vict. c. 37, s. 1) applies. Consequently, the appointment in favour of Edith Phipson Wybrants is valid under the deed of 1877, which revoked the appointment of 1875 in favour of the children of the first marriage. They take nothing.

[THE MASTER OF THE ROLLS: I cannot decide this question now, as the children of the first marriage are not independently represented.]

The fact of their exclusion from participation in the sum of £5000 cannot invalidate the appointment in favour of Miss

Phipson Wybrants, if we are right in our construction of the clause conferring the power to charge; and we submit that there was clearly a power of selection given.

THE MASTER OF THE ROLLS:—

Feb. 21.

Upon the main question discussed before me I do not entertain any doubt, and I think it better to give my decision on it now. The matter which has been last referred to must stand over for discussion by the parties interested in it.

The main question is whether Mrs. Battersby (afterwards Mrs. Phipson Wybrants), in the events which happened, had or had not power to charge an undivided moiety of the lands with £5000 for such of her children as are meant by "younger children." It is admittedly a case where there is no authority to throw much light on the question. The will of Dr. Wybrants disposed of a large amount of property, and it is obviously not a case in which any view of the rights to charge given by the power would startle one as being absurd. Still the question does not turn on the amount of assets, but on what he himself meant. A consideration of the words used is requisite to ascertain what he has done. After making provision for his wife, and bequeathing an annuity to Mrs. Mary Anne Middleton, he devises his real and freehold estate on trusts, not to trustees, but direct to the objects of his bounty, Mrs. Isabella Middleton and Mrs. Georgina Battersby, in equal shares for their respective lives, "and as to the share of each on her decease to her first and every other son successively according to seniority of birth, and the heirs male of the body of such son, and in default of such issue, to the other of them the said Isabella and Georgina for the same estate for life, and with the same subsequent limitations as are herein expressed concerning her original share." That clearly made each of the ladies tenant for life of an undivided moiety of the estate with remainder to the first or other son in tail male, and in default of issue in tail male then to the other who, if living at the time, would become owner of the whole estate for life, or rather of both moieties, with remainder to her first or other son in tail male. Then "as to the entirety of said real and freehold estate on failure of all the limitations hereinbefore expressed," he gave

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and devised all his said real and freehold estate to his cousin Augusta Higginbotham for her life, and after her death to her son Charles for his life, with remainder to his first and every other son according to seniority of birth, and the heirs male of the body of each such son. This is the first time that the word "entirety" is used, but it is to be observed that before that the two estates might have been united in the same person, but from that time on, at any rate, there can be no severance of the estate under the provisions of the will. On failure of the male issue of Charles the testator devises the same, that is the entirety, to William Higginbotham for life with similar remainder to his first and other sons in tail male, and in default of such issue to every subsequent son of the said Augusta Higginbotham for life, with remainder to his sons in tail male in succession, and then to the eldest son of Mrs. Maunsell for life, with remainder in tail male to his sons, and on failure of such issue to the other sons of Mrs. Maunsell for life, with remainder to their respective sons in tail male. On the failure of such issue the estate goes back to the female line with similar limitations in tail to the daughters of Mrs. Middleton and Mrs. Battersby as tenants in common, with cross-remainders, and there are then remainders to the daughters of Mrs. Higginbotham and Mrs. Maunsell, with an ultimate remainder in fee to the testator's own right heirs. He then provides that every tenant for life in possession should have the power of charging £300 as a jointure for his wife. As regards Mrs. Middleton and Mrs. Battersby, who took the first estates for life, and who are obviously objects of his bounty, that power could not arise at all, because it is a "jointure," and (apart from the use of the possessive pronoun "his") that word itself has a legal meaning. It means a provision by a man for his wife but has no application to a provision made by a wife for her husband, and no instance or illustration of such misuse of the word has been produced, and therefore it could not have been intended expressly to refer to the two tenants for life to whom he had first devised the estate. He then goes on—"I also empower every tenant for life of my lands and tenements, whether freehold or chattel, when in possession under the foregoing limitations, by deed or will to charge same with any sum or

sums of money not exceeding in the whole by any one tenant for life the sum of £5000 for the portion or portions of his younger child or children, and payable at such time or times as he or she shall appoint, and to create terms of years for securing same with interest not exceeding 4 per cent. per annum from the day of the decease of such tenant for life." On these words the question now turns.

It is contended on behalf of the child or children of Mrs. Battersby, afterwards Mrs. Phipson Wybrants, that she filled the position of tenant for life within the meaning of that clause. On the other hand it is contended that there is no person at present or at any rate no person during the joint lives of the two first takers of the estate who could have exercised that power at all, because there was no tenant for life of all the lands, and no person who could therefore execute the power as being in possession under the foregoing limitations. Now to adopt that construction would certainly lead to extraordinary consequences; for I gather from the whole frame of the will that the persons in whom Mr. Wybrants, the testator, was most interested were Mrs. Battersby and Mrs. Middleton respectively, for he left a large estate consisting of realty and chattels real and an enormous amount of personalty to them, to the exclusion of everybody else as long as they had male issue at any rate, and yet it is said he gave them no power to charge a farthing in favour of younger children. That would be a very startling result, even in a will where there is no power of charging portions for younger children at all; and it would be an extraordinary omission if it occurred in a will of such a character. But in a will where there is express provision in general terms enabling a tenant for life to charge portions for younger children it is almost inconceivable, apart from the legal language of the will itself, that the testator could have intended any such result to follow. How was he situated when the clause was drawn? Mrs. Battersby was one of his cousins. She was married. He describes her in the will as the "wife of Thomas George Battersby." The will was made in 1869, and he died in 1875. There were two children of the marriage, both girls. At the time of his death in 1875 there was no modification or alteration in any way of the will. These two girls could not take till after the exhaustion of a

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long line of limitations. Then he made a codicil in 1872, and it is very probable that at least one of the children was then in being. At any rate his testamentary disposition was never altered and speaks from his death. Is it conceivable that the first object of his bounty should have nothing but a life estate, while the property was left in such a way that there was no power to appoint one farthing in favour of children, one of whom at least was in existence at his death?

In considering what is the meaning of "tenant for life of my lands and tenements" it is not necessary to resort to the doctrine of seisin *per my et per tout*. The question is, did the testator mean or did he not mean that Mrs. Battersby and Mrs. Middleton should be deemed tenants for life with power of appointment? In the ordinary use of such words, when applied to the tenants for life of an estate, they would no doubt mean of the whole estate, unless the contrary were shown. But I cannot think that such was the meaning of the testator here. It is to my mind clear that he treated each as tenant in common of her share for life, with a power of appointment appurtenant to her tenancy for life. There is an inaccuracy in the use of the possessive pronoun "his" alone in the first instance, but this is made clear when he gives the power "as he or she shall appoint" so that he must have contemplated giving the power to some female tenants for life; and on the hypothesis that Mrs. Battersby and Mrs. Middleton did not fill that capacity, what female tenant for life possessing such power could there be? In devising the estate with elaborate limitations, he looks to the estate proceeding through the whole line of limitations as provided by him, without alteration; and although the first tenant in tail in remainder of the whole estate might take steps to effect a re-settlement of it as he thought fit, the testator deals with the estate as disposed of by his will, and under the will, if you exclude from the description of "tenants for life of the lands" Mrs. Middleton and Mrs. Battersby, there is no other possible female tenant for life except Mrs. Higginbotham. Is it possible where the testator clearly shows the intention to confer the power on some at least of his female relatives, that this can relate merely to the case of Mrs. Higginbotham, to the exclusion of the primary objects of his bounty? That cannot have been his meaning, and it is certain

that he never intended that his cousins should be debarred from exercising this power.

If that is the meaning of the clause as it stands, how is it affected by the other powers contained in the will? The jointuring power, I think, does not apply to the case of a female. It is one of the customary incidents of settled property that every tenant for life has a power of jointuring and charging portions for younger children; but in the case of a female, while she would have the power of charging portions for younger children, she would usually have no power of jointuring, as her sex and the nature of things forbid it. There is no light, therefore, thrown on the express power to charge by reference to the jointuring power.

It is said, however, with some force, that the power of leasing contained in this will throws more light upon it, and it is argued that a leasing power is one that from its nature can only be exercised by one who has come into possession of the estate in what the testator calls its "entirety," and that it could not be exercised during the time that the estate is enjoyed in undivided moieties. I am not at all sure that this is the construction to be put on the power of leasing before me. I do not see why the power could not be conferred on the respective tenants for life of leasing in undivided moieties. There is no legal objection to it. The 19th section of the Settled Land Act, to which Mr. Shaw referred, appears to support its legality. I see no difficulty in adopting a construction which would give this power to each of these persons in accordance with his or her respective estate or interest in it. It is quite true that a lease of an undivided moiety is not a very desirable kind of property; still one tenant for life might make a valid lease to another, or if two tenants for life of undivided moieties choose to concur in making a lease there is no difficulty about it. If this is so the power of leasing throws no light on the construction of the power to charge because it would be exerciseable by the same persons and under the same conditions.

I think the "name and arms" clause fortifies the conclusion I have arrived at, for the testator could hardly have intended that this clause should have no application whilst and because the estate was enjoyed in undivided moieties.

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On the whole I have no doubt that Mrs. Battersby had power to charge the undivided moiety which was hers for life up to the amount of £5000.

March 9.

On the 9th day of March, 1894, the case came on for re-argument on the question as to the effect of the execution of the power to charge her moiety of the lands by Mrs. Phipson Wybrants (formerly Mrs. Battersby) by the deed of 1875 in favour of the children of her first marriage, and by the deed poll of 1877 in favour of Edith Phipson Wybrants, child of her second marriage, purporting to revoke the previous appointment of 1875.

Stanley, Q.C., for Mrs. Thorne and Miss Battersby (the children of the first marriage) :—

By the testator's will there is no power of appointment in favour of children conferred on the first tenants for life. They were merely enabled to charge the sum of £5000 on the estate and fix the date of payment. Whatever sum might be charged would be divisible among all the objects of the power in equal shares according to the rule that equality is equity.

Younger children are those children who do not take the family estate, and my clients are therefore entitled to participate in the charge: Jarman on Wills, p. 1058; Lewin on Trusts, p. 428; and the principle applies in the case of any person who settles an estate in the way that the testator has done in this case: Elphinstone on Deeds, p. 351.

The deed of 1875 contained no power to revoke the charge thereby created, but only provision enabling the revocation of the power of appointment. The subsequent deed was therefore invalid, and the first remains good: Farwell on Powers, p. 271; *Worrall* v. *Jacob* (1).

As to 37 & 38 Vict. c. 37, the clause in the will giving the power to charge declares the amount of the sum to be divided amongst the objects of the power, and the 2nd section of the Act prevents the application of the provisions of section 1 to this case. Con-

(1) 3 Mer. 256.

sequently the deed of 1877 enures for the benefit of *all* the children of Mrs. Phipson Wybrants, and my clients are entitled to participate in the sum of £5000 charged on the undivided moiety.

The residuary estate is, in addition to the freehold and chattels real, charged with the £5000 under the provisions of the deed of 1877: *Cooper* v. *Macdonald* (1).

The same counsel appeared for the other parties interested as on the previous hearing.

THE MASTER OF THE ROLLS held that on the construction of the will there was a power given to charge in favour of children in unequal shares or exclusively in favour of one or more, such sum or sums so charged not to exceed in the whole £5000. That there was a valid charge or appointment in favour of Edith Phipson Wybrants under the deed poll of 1877, and that under the terms of the deed one undivided moiety of the lands, hereditaments, and premises of the testator, including the chattels real and excluding the personal estate, were subject to the charge of £5000 thereby created.

The Court made the following order:—

"THIS COURT doth declare the plaintiff entitled to a charge of £5000, appointed to her by her mother, the late Georgina Maria Phipson Wybrants, by deed dated the 17th day of April, 1877, with interest thereon from the date of the death of her said mother at 4 per cent. per annum, until paid. This Court doth declare the said sum of £5000, and said interest thereon, well charged on the one undivided moiety of testator's real estate and chattels real."

Solicitors for the plaintiff: *Longfield, Kelly, & Armstrong.*

Solicitor for the defendants, the executors and trustees of the will: *Overend.*

Solicitors for Mr. and Mrs. Wybrants, and for Mrs. Thorne and Miss Battersby: *Montgomery & Chaytor.*

Solicitor for Mrs. Higginbotham: *Thomas Falls.*

R. W. L.

(1) L. R. 16 Eq. 258.

M. R.
1893.

Nov. 21.
Dec. 7.

ATKINSON'S TRUSTS; Ex parte FITZROY.

(1893. No. 834.)

Marriage settlement—Covenant to settle any further property to which intended wife, or husband, in her right, should thereafter become entitled during the marriage—Application of words of future acquisition to chose in action of wife at date of settlement.

A by will directed his trustees to pay the income of one-fourth of his residuary estate to his granddaughter B for life, and after her death to stand possessed of her share for her children, and directed that an annual sum, not exceeding £200, should be allowed for B's maintenance.

The trustees invested the surplus income during B's minority, and on her attaining age paid her the interest on the accumulations, as if they were part of her one-fourth share. B afterwards married C, and put in settlement property to which she was entitled under her father's will. There was no reference to her grandfather's will save a recital that, pursuant to a power contained in that will, B had appointed an annuity to C in the event of his surviving her. The settlement provided that in the event of B, during the continuance of the marriage, or C in her right, thereafter becoming entitled to any further property exceeding £400, either under her father's will or otherwise, the property so acquired should be held on the trusts of the settlement.

C afterwards died, and the accumulated fund being claimed both by B and by the trustees of the settlement, the trustees of the will paid it into Court, under the Trustee Relief Act:—

Held, that the fund was not bound by the trusts of the settlement, and that B was entitled to have it paid out to her.

Petition.

This was an application on behalf of the petitioner, Anne Woolsey Fitz Roy, widow, for payment out to her of a sum of £1718 9*s.* 3½*d.*, lodged in Court under the Trustee Relief Act by the trustees of the will of Edward Atkinson, senior, deceased, under the following circumstances:—The testator by his will dated 9th February, 1865, devised and bequeathed all his real and personal property to trustees, upon trust to sell and convert, and invest the proceeds, and, after payment of certain legacies and annuities thereout, upon trust to divide the residue into four equal parts,

and appropriate one of such parts to each of his four granddaughters Mary Atkinson, Elizabeth Ford Atkinson, Anne Woolsey Atkinson, now Anne Woolsey Fitzroy the petitioner, and Jane Atkinson, and to pay the income of the share appropriated to each such granddaughter to her for life for her separate use, independently of any husband she might have married, or might marry, and without power of anticipation, and after the death of each granddaughter, subject to any life interest which might be given to the husband of such granddaughter under the power thereinafter contained, the trustees were to stand possessed of the share appropriated to such granddaughter, and the income thereof upon trust for the children of such granddaughter as therein mentioned, with power to each granddaughter to appoint that the income of her share be paid after her death to her husband for life. The trustees were empowered to postpone the sale and conversion of the estate as long as they thought fit, and were to have the fullest powers of apportioning blended trust funds, and of determining whether any moneys were to be treated as capital or income, and generally of determining all matters as to which any doubt, difficulty, or question arose under the will. The testator desired that an annual sum not exceeding £200 for each of his said granddaughters should be allowed to their mother for maintenance during minority.

On the death of the testator, on 26th November, 1865, three of his granddaughters, namely, Elizabeth Ford Atkinson, the petitioner, and Jane Atkinson, were minors, and after providing £200 a-year for maintenance there was an annual surplus during minority, which was ascertained upon the coming of age of each granddaughter. The petitioner came of age on the 21st June, 1872, and the savings arising from her surplus income were ascertained to be £1718 9*s.* 3½*d.*, and this sum, together with the sums arising from the savings of her sisters, remained under the control of the trustees of the will, and was mixed up and invested by them in their joint names, as if these sums were portion of the original *corpus* of his estate, and interest at the rate of 3½ per cent. was paid upon this sum.

In April, 1877, the petitioner married Frederick Southampton L'Estrange Fitz Roy (since deceased), and a settlement was executed in contemplation of the marriage on 6th April, 1877,

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by which certain moneys belonging to the petitioner as one of the residuary legatees of her father, Edward Atkinson, junior, were settled. The only reference in the settlement to her grandfather's will was a recital that she had exercised the power thereby given to her of appointing the income of her share thereunder to her husband for life in the event of his surviving her. After declaring the trust of the moneys put in settlement, namely, to pay the income to Jane Atkinson, widow, for life, and after her death upon the usual trusts of a marriage settlement, came the following clause:—"And it is hereby agreed and declared by and between all the parties hereto that in the event of the said Anne Woolsey Atkinson during the continuance of the said marriage, or the said Frederick Southampton L'Estrange Fitz Roy in her right, hereafter becoming entitled to any further property, exceeding at one time and from one source the sum of £400, either under the will of her father or otherwise howsoever and not otherwise settled, then and in such case the property so acquired shall be transferred to, and vested in, the trustees or trustee for the time being of these presents, and shall be held by them on the same trusts, and subject to the same powers, provisions, and declarations as are hereby declared of and concerning the trust funds hereby settled, or as near thereto as the nature of the property may admit, and save that the income thereof shall be paid as if the said Jane Atkinson, widow, had died."

Frederick Southampton L'Estrange Fitz Roy died on the 23rd May, 1890, leaving the petitioner his widow, and three children, who were minors.

In May, 1891, a doubt was raised by the solicitors for the trustees of the will of Edward Atkinson, senior, as to whether they had not been in error as to the manner in which the savings during the minority of the testator's granddaughters had been dealt with, and they were advised that the share of such savings of the petitioner, who attained age before marriage, and whose husband died without having reduced the same into possession, belonged to her unless it was captured by the settlement executed on her marriage. The amount of such savings having been claimed by Mrs. Fitz Roy, and also by the trustees of her settlement, the trustees of the will paid the £1718 9*s.* 3½*d.* into Court under the Trustee Relief Act.

T. P. Law, Q.C., for the petitioner :—

The words of the covenant describe only property to be acquired in future, and do not therefore bind the accumulations to which Mrs. FitzRoy was entitled at the time of her marriage: *Robinson* v. *Gandy* (1). *Williams* v. *Mercier* (2) is there distinguished. Even if the accumulations are to be treated as a reversionary fund, or as a chose in action, the husband had at most an inchoate title depending on the property falling in or being reduced into possession during the coverture, which did not take place, as the husband did not survive the wife: *Re Pedder's Settlement Trusts* (3), *Re Jones' Will* (4), *Fisher* v. *Shirley* (5).

Matheson, Q.C., for the trustees of the settlement :—

The authorities on the construction of a covenant of this kind are not uniform: Prideaux on Conveyancing, 14th ed., vol. ii., p. 242, where the decisions are summarized. Here the property is not a reversionary fund, but a sum of money which the husband could have obtained from the trustees of the will the day after his marriage, if it was not bound by the covenant in the settlement.

[THE MASTER OF THE ROLLS: Does the *dictum* of Jessel, M.R., in *Jones' Will* (4), as to the title of the husband being inchoate only, apply to a chose in action not reduced into possession ?]

No: *Grafftey* v. *Humpage* (6), *James* v. *Durant* (7).

[THE MASTER OF THE ROLLS: Elphinstone on Deeds, p. 514, states the rule laid down in *Re Clinton's Trust* (8) as follows:— "Property to which the wife is entitled in possession at the date of the settlement is not bound by the covenant when the subject matter of the covenant is described by words of future acquisition only." The author is of opinion that *James* v. *Durant* (7) is not now law, but in the addenda, p. lviii., he qualifies these statements owing to *Williams* v. *Mercier* (2)].

Robinson v. *Gandy* (1) cannot shake the authority of *Williams* v. *Mercier* (2), which shows that the words in the event of the intended

(1) 33 Ch. Div. 300.
(2) 10 App. Cas. 1.
(3) L. R. 10 Eq. 585.
(4) 2 Ch. D. 365.
(5) 43 Ch. D. 290.
(6) 1 Beav. 46.
(7) 2 Beav. 177.
(8) L. R. 13 Eq. 295.

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husband "*in her right* hereafter becoming entitled" capture property which the intended wife had at the date of the settlement. [He also referred to *Blythe* v. *Granville* (1); *Archer* v. *Kelly* (2); *Re Viant's Settlement* (3); *Re Michells' Trusts* (4).]

T. P. Law, Q.C., in reply:—

In the cases relied on proceedings were taken against the husband or his assignees in bankruptcy or his executors to bring in the fund: here the wife survived the husband and claims the fund in her own right, after the period of coverture. If the husband had a right to reduce the property into possession, that right ceased by his death before his wife, and his representatives would have no right to the fund.

Dec. 7.

The Master of the Rolls:—

[Having stated the facts of the case as contained in the affidavit of the petitioner, proceeded as follows:—]

The settlement of 6th April, 1877, does not specifically deal with the funds which passed under the will of Edward Atkinson, except that it refers to an appointment by Anne W. Atkinson, by deed of even date, of an annuity to her intended husband, made pursuant to a power in the will. The funds with which the settlement is mainly conversant consist of personal estate, the property of Anne W. Atkinson, under the will of her father Edward Atkinson, junior. There is no recital bearing upon the question which now arises for decision, and no clause throwing any light, so far as I can see, upon the construction of the covenant to settle after-acquired property, except that the reference to Mrs. Fitz Roy's power to appoint an annuity in favour of her husband, should he survive her, shows that the will of Edward Atkinson, senior, was not forgotten by the parties to the settlement. It was present to their minds, but it was not supposed that it was needful to do anything about it, as it was itself, in form, a complete and probably satisfactory settlement. In the events which have happened, the accumulated income which arose in each year of Mrs. Fitz Roy's

(1) 13 Sim. 190.
(2) 1 Dr. & Sm. 300.
(3) L. R. 18 Eq. 436.
(4) 6 Ch. D. 618.

minority, after providing the £200 annuity, formed a fund which was absolutely hers, as a chose in action, at the date of her marriage, bound by no trust for separate use; and had it been in her hands in specie at the time, or had her husband during the coverture called upon the trustees to pay it to him, and so reduced it into possession, a different question would have arisen. As it is, the matter to be determined is whether she is now entitled to it absolutely, or whether it is captured by the trusts of the settlement. The latter contention has been properly urged by the trustees, who represent all the persons interested under the settlement.

There are two ways in which a fund situated as this is may be claimed; one, as being property to which the wife becomes entitled; and the other as being property to which the husband becomes entitled in right of his wife. The former contention was not much pressed by the trustees. Nor could it be on this instrument. By no possible straining of language could it be held that money to which Mrs. Fitz Roy was absolutely entitled at and before the date of the settlement was within the words, "in the event of the said Anne W. Atkinson during the continuance of the said marriage . . . hereafter becoming entitled to any further property." The words are so plainly words of futurity, that they must be treated as beyond all doubt referring exclusively to property to which she was not then, but might thereafter become, entitled. The question turns altogether upon the other branch of the clause; and it is said the intended husband at the date of the settlement was not entitled to any property in right of Anne W. Atkinson, the intended wife; but immediately on the solemnization of the marriage he did become entitled, *jure mariti* and in her right, to all her personal estate not settled, comprising choses in action; and therefore the fund in question is within the clause.

In considering this argument two points arise:—1, did the husband become entitled to the fund in question within the meaning of the covenant, never having done anything to reduce it into possession; and, 2, if so, did he so become entitled "thereafter"?

Before considering any of the authorities bearing upon the question, it is well to see what, apart from them, the clause would

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fairly mean, and I think there can be but little doubt that it never was intended to include property that was the wife's at the date of the marriage. It was not supposed there was any such, or at least any which was not already settled, as was supposed to be the case with what belonged to her under her grandfather's will. There is but one sentence, and if the words are clearly words of futurity as regards the wife, it is improbable that they should have been intended to operate in any different way as regards the husband's title in her right. No doubt the word "hereafter" would be literally satisfied by the occurrence of any event after the making of the settlement, and before, at, or after the marriage; but in this context that can hardly be the meaning, because between the settlement and the marriage Captain Fitz Roy could acquire no title to anything in right of his intended wife. The acquisition of such a title must therefore *prima facie* have reference to some time, be it long or short, not after the settlement alone, but also after the marriage. This view is also confirmed by the words "during the continuance of the said intended marriage."

The language used by conveyancers in drafting these clauses varies greatly, and accordingly it is not easy to find two cases between which some distinction may not be suggested by diversity of phraseology. But in several cases, before the most recent, words like those used in the present case have been held not to bring into settlement personal property to which the wife was entitled at the time of the marriage and of the settlement. Of this class *Archer* v. *Kelly* (1), *Churchill* v. *Shepherd* (2), *Clinton's Trusts* (3), *Blythe* v. *Granville* (4), *Spring* v. *Pride* (5), and *Jones' Will* (6), are examples; on the other hand, *Grafftey* v. *Humpage* (7), *James* v. *Durant* (8), *Viant's Trusts* (9), and in this country *Hamilton* v. *Jones* (10) seem inconsistent with that view; and indeed Wickens, V.-C., in *Clinton's Trusts* (3), purported to overrule *James* v. *Durant* (8); but *Clinton's Trusts* (3) was prior to *Viant's Trusts* (9) and

(1) 1 Dr. & Sm. 300.
(2) 33 Beav. 107.
(3) L. R. 13 Eq. 295.
(4) 13 Sim. 190.
(5) 10 Jur. (N. S.) 646.
(6) 2 Ch. D. 362.
(7) 1 Beav. 46.
(8) 2 Beav. 177.
(9) L. R. 18 Eq. 436.
(10) Ir. R. 11 Eq. 223.

Hamilton v. *Jones* (1), while *Viant's Trusts* (2) was disapproved of by Jessel, M.R., in *Jones' Will* (3).

The law was in this very unsatisfactory condition till the matter came before the House of Lords in *Williams* v. *Mercier* (4). It remains to see how far that case clears up the obscurity.

In *Williams* v. *Mercier* (4) the words of the settlement were:—"It is hereby agreed and declared that all real and personal property to which the said F. Farquharson or the said T. A. H. Williams in her right at any time during her now intended coverture shall become entitled whether in possession, reversion, or otherwise (except jewels, trinkets, ornaments of the person, plate, linen, china, furniture, pictures, prints, books, and articles of a like nature, which it is hereby declared shall belong to the said F. Farquharson for her separate use, and except also any legacy or other property acquired at one and the same time, not exceeding in amount or value the sum of £300), shall" be transferred to and vested in trustees upon certain trusts. The trusts included a power of sale, "so nevertheless that the money to arise from such sale be held and applied upon the trusts and with and subject to the powers, provisoes, agreements, and declarations hereinbefore declared and contained concerning such part of the personal estate of or to which the said F. Farquharson *now is*, or she or the said T. A. H. Williams in her right shall become, possessed or entitled as aforesaid, and shall consist originally of money."

The Lord Chancellor (Lord Selborne) in advising the House said (page 5):—"Let us for a moment look at those words as they stand by themselves, and without reference to any of the authorities. It is to be observed that there is a perfect generality as to the subject; 'all real and personal property,' without the addition of any words which can assist the construction as showing by what sort of title that property was to become the wife's. In some of the cases the words 'devise,' 'descent,' and so on, or other words, occur, which, whether of greater or less weight, may at all events have been of some use in assisting the construction and tending to show that an after-acquired title alone was in view. If

(1) Ir. R. 11 Eq. 223.
(2) L. R. 18 Eq. 436.
(3) 2 Ch. D. 362.
(4) 10 App. Cas. 1.

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those words are of importance for that purpose they do not occur here.

"Again, there is an exception of jewels and so forth, and as far as the nature of that exception and the intention indicated by it go, it certainly does not seem obvious that the principle on which such an intention would proceed as to after-acquired 'jewels, trinkets, ornaments of the person, books, and articles of the like nature,' and some other things, might not extend as much to presents of that kind given by the husband or friends in contemplation of the marriage, or already in the possession of the wife, as to those things which might be given afterwards. I am not aware that in any of the authorities which have been referred to there is any exception of that kind calculated to give any assistance in the interpretation of the intention.

"There is nothing here indicating an intention not to include in the covenant property then vested in the wife; and there is something which is not found in other cases which, at least in its principle, would be consistent with an intention to include it; and, if so, to include in the exception the things of the same sort of which she was already possessed, as well as those which might come to her afterwards. Still, if the words are not, in their proper, literal, and grammatical construction, capable of being applied to that to which she was already entitled, that which I have said might be an insufficient reason for holding that they do so apply. But can it be possibly said, upon any sound principles of construction, that the words are incapable of being so applied? What are they? 'All real and personal property to which the said F. Farquharson or the said T. A. H. Williams in her right at any time during her now intended coverture shall become entitled.' If the wife only had been mentioned, if it had been 'to which she at any time during her now intended coverture shall become entitled,' they would have been words of futurity, exclusive of the title already vested in the wife. That was the case in some of the authorities; and the argument would have been strong, if it had been so here, that there were no words to cover what she was already entitled to. But the words do not relate to the wife only—they relate to her or her intended husband in her right. He at all events had no title, at the time at which this instrument

was made, to anything which belonged to her, and if he acquired a title it must necessarily be a future title; and the only question would be whether it was in her right, and whether it was acquired by him during the then intended coverture. Well, it was in her right, I conceive; for when the wife's property is transferred to the husband, he is subrogated to the right which she had before. He does not claim it by any original right of his own; he claims it in that which was an original right of his wife of which he is now, by virtue of his marital title, to obtain the benefit. The words 'in her right,' therefore, are, in my judgment, capable of being properly, sensibly, and grammatically applied to property of this description, to which the husband might become entitled by reason of the marriage.

"Then the question would be whether the words 'at any time during her now intended coverture' would apply. Surely you cannot exclude from the duration of the coverture the first moment of its inception any more than you can the last moment of its continuance. The moment the marriage is complete by the performance of that which make the parties husband and wife, that moment the coverture begins, and if at that moment he becomes entitled as her husband in her right, I am unable to say that it is not during the intended coverture, in a sense which the words may rightly, grammatically, and reasonably bear."

Down to this point of the judgment it would seem as if the view of the learned lord was that words such as we have to deal with would *per se* subject the property in question to the trusts of the settlement. But he goes on:—"Now far be it from me to say that a context or an intention discovered from those extrinsic facts and circumstances which are legitimately to be taken into account, might not lead to the conclusion that what was meant was only that property which the wife should afterwards acquire, and in which her husband should succeed to the rights or become subrogated to the rights so afterwards acquired by her. Many circumstances might justify such a conclusion. Authorities have been referred to in which such a conclusion was arrived at. I will mention one of them by way of illustration only—such a case as *Hoare* v. *Hornby* (1), where all the parties were contending with

(1) 2 Y. & C. Ch. Cas. 121.

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each other with equal knowledge that the wife was then entitled under two known wills, the one English and the other American, and they expressly made the settlement of the property under the English will, and said nothing whatever about the American; and there was a general covenant of this sort in words of futurity. I think it was a very reasonable thing at all events, and not surprising, even if the words 'if any,' which are words of uncertainty, had not been added, to construe that as meaning only what the husband should acquire a right to by reason of an after-acquired title of the wife. It is not necessary to go through the cases or to express any opinion upon them, but it is probable that in other cases in which a similar conclusion was arrived at the reason was the same. If the words are capable of the sense of which I think they are capable, and which in some of the authorities has been placed upon similar words, whether those authorities were rightly decided or not, the question for your Lordships is whether that is the true sense of the words of this settlement; and that is to be ascertained, not from a context of words more or less dissimilar in some other settlement, but from the whole contents of this settlement. I am of opinion that the words are capable of such a sense. I do not say that they bear it so clearly, that it might not be repelled by a context, or even by extrinsic circumstances looked at in connection with the context, which would tend to repel it; but we have to consider what we have here. Looking at the immediate context only, as far as I can form an opinion, I think there might be something to be said on both sides, but certainly the construction is not repelled by any particular words which would exclude these articles. And we find later on in the same instrument words which appear to me most plainly and expressly to show that it was meant to include these things—words which must be rejected if these things are not included; because in a clause referring to this very covenant or part of the agreement it is said that the trustees shall have power to sell securities under this very portion of the settlement, and then that 'the money to arise from such sale shall be held and applied upon the trusts, and with and subject to the powers, provisoes, agreements, and declarations hereinbefore declared and contained concerning such part of the personal estate of or to which the said F. Farquharson

now is, or she or the said T. A. H. Williams in her right shall become possessed or entitled as aforesaid.' Those words 'now is' are unambiguous; and they declare expressly, that in the view of the parties the previous powers, provisoes, agreements, and declarations as to the wife's property relate not only to property which shall come to her or to her husband in her right by a future title, but also to property of which she at that very time was possessed or to which she was then entitled. Whether or no the draftsman intended to make use of similar words in the previous clause is a point upon which your Lordships can have no legitimate means of information. But supposing that he did not, supposing you are to take, as probably you ought to take, the instrument simply as it stands, the first words to which I have referred are, in my judgment, at least, susceptible of a construction, a reasonable and grammatical construction, which would include the property to which this lady was at the time entitled; and those words which occur in the latter part of the settlement expressly show that all the parties to the instrument executed it upon the understanding and with the intention that the covenant should have that effect."

Lord Blackburn is of the same opinion. He says, at p. 10:—"When the wife by marrying the husband caused the property which was hers to become his, I cannot bring myself to doubt that in one sense of the words he did become entitled to it in her right, and he became entitled to it in her right at the one indivisible instant when the coverture commenced; and I think that the words 'at any time during her now intended coverture' might apply to those things which became vested in him, became his in her right, at the very instant when the coverture commenced, and contemporaneously with it. It is something like the old case which was so much discussed in Plowden's Commentaries, whether a man who committed suicide forfeited the property by having killed himself during his lifetime or not. The indivisible interest when he became dead is, I think, like the indivisible interest when the coverture commenced, which might, I think, be included under the words in the instrument 'at any time during her now intended coverture.' At the same time I think that that is by no means the clear and obvious construction, and I think

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that a very little circumstance may show that it was not intended to include that, but was intended to be confined to things *in futuro* altogether, to such property as she might acquire afterwards." He comes to the conclusion that the later clause made the intention of the parties clear, and that the jewelry and other articles in question, which were certainly the property of the wife, came under the covenant that they were to be excepted from the property conveyed to the trustees for the purposes of the marriage settlement, and were within the exception that they were to be for the separate use of F. Farquharson.

Lord Bramwell concurred. He says:—"It is said that the previous provision relates (to express it shortly) to after-acquired property. Cogent arguments have been used in support of that contention, and weighty authorities cited also. I should have been inclined to say that but for the clause to which I am about to refer it would be a difficult question." He then refers to the later clause and comes to the conclusion that it represented the real intention of the draftsman.

Lord Fitz Gerald says:—"The doubt which I entertained on the construction of the settlement as to the declaration and agreement for the settlement of the wife's property has been so far removed by reference to the trusts concerning 'the personal estate to which F. Farquharson *now is*, or she or her intended husband in her right shall become, entitled,' that I have come to the conclusion that the construction adopted by the Court of Appeal is correct, and entirely supports the decision of that Court."

The case of *Williams* v. *Mercier* (1) turned to a large extent upon the clause which provided for the application of the proceeds of the sale of after-acquired property in connection with which the words "*now is*" occur and which the Lords regarded as throwing light upon otherwise ambiguous language. What the decision would have been without that clause it is not easy to say with complete certainty. There are expressions in the judgments I have read, which seem to point in different ways.

But *Williams* v. *Mercier* (1) came to be considered in the Court of Appeal in *Robinson* v. *Gandy* (*Re Garnett*) (2). The facts of that case

(1) 10 App. Cas. 1. (2) 33 Ch. D. 300.

were peculiar. Two sisters, who were each entitled under their uncle's will to a fourth of his residuary estate, gave a release to their aunt, who was trustee and executrix of the will, in consideration of the payment of the sum of £10,500 to each, which was all it was supposed they were entitled to. After the death of the aunt it was ascertained that they should have each received £5000 in addition, and the release was set aside, on the ground that it was executed in error, and without any independent advice. Shortly after the execution of the release the sisters were married. The settlements, which were identical, recited that the intended wife was absolutely entitled, amongst other property, to £10,000, part of her share of the residue of her uncle's estate in the hands of his executrix and secured by a mortgage, and that such deed contained an agreement that the £10,000 was to be held upon the trusts of the settlement, and that it had been agreed that the intended husband and wife should enter into such covenants for the settlement of the future real and personal estate of the intended wife, as thereinafter contained. The £10,000 was settled upon certain trusts thereinafter mentioned, and the intended husband and wife covenanted with the trustee "that all the estate, property, and effects whatsoever, both real and personal, exceeding at any one time the sum of £300 in value, other than except such as shall be of a chattel nature alone, which the said intended husband and the said intended wife, or either of them in her right, shall at any time or times subsequent to the solemnisation of the said intended marriage and during the said intended coverture become seised or possessed of or entitled to, either at law or in equity under any gift, devise, or bequest in her favour, or by descent, representation, or any other means whatsoever, shall be assured or settled" upon the trusts thereinbefore declared concerning the £10,000 or as near thereto as circumstances would admit. Kay, J., held, first, that this covenant did not apply to any personal property (other than the £10,000) to which the wife was entitled at the moment of marriage; and, secondly, that the covenant affected the £5000 additional, because the wife only became entitled to it by the order of the Court setting aside the release. The Court of Appeal affirmed his decision on the first point, but differed with him on the second point, inasmuch as the right

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to the additional sum existed at the date of the settlement, and the release only removed the difficulty in getting it.

Cotton, L.J., at p. 305. says :—"Then reliance is placed by the trustees on the case of *Williams* v. *Mercier* (1). But in my opinion that case must have turned on this, that the covenant there was the only part of the instrument which could bring into settlement the property to which the wife was entitled at the date of the settlement. There were words in the settlement declaring the trusts of the money to arise from the sale of certain chattels, which refer to the settlement contained in the proviso as to that property to which the intended wife was then entitled, and that could not be found anywhere except in this covenant; and there being a great variance in the words, their Lordships held, affirming the Court of Appeal, that the covenant did apply to the then present property of the lady. The words of the settlement, but unfortunately not the whole of the settlement, are set out in the House of Lords' report (2), and there is also a reference to the trust of the money to arise from the sale of certain property. What I gather from the report, although the settlement is not set out, is confirmed by the recollection of Lord Justice Lindley, that there was nothing in the settlement, except the covenant, which could affect the then present property of the lady. The interpretation of the covenant, and the fact I have last mentioned, are alluded to in the judgments of Lord Blackburn and Lord Bramwell, and, I think, also alluded to by the then Lord Chancellor, Lord Selborne. Having regard to the context, and having regard to the terms of the settlement, it was held to apply to property which the intended wife had at or immediately before the date of the settlement. In my opinion that is not the true construction of this covenant, and of this settlement, having regard not only to the covenant, but to the contract. We cannot guess what the parties would have done if they had known it." Lindley and Lopes, L.JJ., concurred.

It therefore cannot be said that *Williams* v. *Mercier* (1) is an authority for the proposition that *per se*, and without any context, the covenant would have bound property to which, at the date of the settlement, the intended wife was entitled. On the other

(1) 10 App. Cas. 1. (2) *Ibid.* 2.

hand there is in the case before me no recital, as in *Robinson* v. *Gandy* (1) of an intention to settle "*future*" property. The case is very much on the line. But on the whole, I think that the undoubted reference to the will of Mrs. Fitz Roy's grandfather, though for another purpose, indicates that there was no intention to include anything to which she derived title under that will, and that the petitioner is entitled to payment of the fund in Court.

On the other point suggested in the argument, viz. that the right of a husband to his wife's choses in action, before reduction into possession, is not the accrual of a title within the meaning of such a covenant, it is unnecessary for me to pronounce an opinion, having regard to the conclusion at which I have arrived on the other question. Jessel, M.R., in *Jones' Will* (2), says:—"The sort of inchoate title that he had during the coverture, depending on the possibility of the property falling into possession during the coverture, really amounts to no title at all. Property such as this is not property to which the husband or the wife 'became entitled during the coverture.'" But that was the case of a reversionary interest: and there would be great difficulty in holding that a chose in action of the wife, not reversionary in its character, but vested at the time of marriage, comes within the same principle. The cases seem opposed to the contention; but, as I have said, it does not call for a decision in the present case.

Solicitors for the parties: *William Fry & Son.*

W. L.

(1) 33 Ch. D. 300. (2) 2 Ch. D. 360.

Appeal.
1894.
Nov. 23.

WALKER *v.* ATKINSON (1).

(1894. No. 754.)

Practice—Security for costs—Plaintiff resident out of the jurisdiction—Satisfactory affidavit—Defence upon the merits—Order XXIX., R. 3.

By a settlement dated the 30th May, 1863, executed on the marriage of J. H. W. and Jane P., the mother of J. H. W., Elizabeth W., covenanted with R. A. and J. W., the trustees of the settlement, that she would by will give one-third of her real and personal estate to the trustees of the settlement upon trust during the joint lives of J. H. W. and Jane P. to pay the income to Jane P. for her separate use, and after the death of either of them upon trust if J. H. W. should be the survivor to convey the said share to J. H. W. absolutely; but if Jane P. should be the survivor to pay the income to her during her widowhood, and on her decease or second marriage upon trust for the children of the marriage in equal shares.

By her will, dated the 18th November, 1877, Elizabeth W. left all her property to her executors and trustees upon trust to divide the same equally beween her three children, of whom J. H. W. was one, and in case he predeceased her, his share was to go to his children. She died in 1879, and her will was proved.

The plaintiffs were the children of J. H. W. and Jane P., both of whom were alive, and all the plaintiffs resided out of the jurisdiction. J. W., one of the trustees, was dead. In an action against R. A., the surviving trustee of the settlement for not having secured for them one-third of the assets left by Elizabeth W., the defendant moved for security for costs, and in his affidavit stated that he had never heard of the death of Elizabeth W. until about three years before the action, and no notice of the death had been served upon him or his co-trustee, nor had they been asked to get in the property; that both the parents of the plaintiffs were alive; and the interest of the plaintiffs in any of the property settled was contingent only; and further that the executors of Elizabeth W., in ignorance of the settlement, had paid over one-third of her estate to J. H. W., who afterwards became bankrupt:—

Held, (affirming the decision of Porter, M.R.), that this was not a satisfactory affidavit that the defendant had a defence upon the merits, so as to entitle him to security for costs.

(1) Before WALKER, C., and FITZGIBBON and BARRY, L.JJ.

Appeal. 1894. WALKER v. ATKINSON.

APPEAL from an order of Porter, M.R., dated 5th November, 1894, refusing an application on the part of the defendants for security for costs.

The action was brought by Elizabeth Parkin Walker, Henry Hamilton Walker, Ernest Wm. Walker, Arthur Heselrige Walker, Frank Maynard Walker, and five minors, Margaret, Herbert, Gertrude, Charles, and Percy Walker, by Edward Pilcher their next friend, against Robert Atkinson, for breach of trust. Three of the plaintiffs lived in America, and seven in England; the next friend of the minors also lived in England.

The action was brought for a declaration that the defendant committed a breach of trust in not having enforced and not enforcing payment of and not having got in the one third part or share of the estate of Elizabeth Heselrige Walker (deceased) which formed part of the trust funds comprised in or subject to an indenture of settlement, dated the 30th May, 1863, and made between John Henry Walker, of the first part, Elizabeth Heselrige Walker (since deceased) of the second part, Jane Pilcher of the third part, and Joseph Woodall (since deceased) and the defendant of the fourth part, and that the defendant was liable to make good the amount thereof with interest at £5 per cent. from the death of Elizabeth Heselrige Walker and all loss which had already accrued or might thereafter accrue to the trust estate by reason of such breach of trust.

By the settlement referred to, which was executed on the occasion of the marriage of John Henry Walker and Jane Pilcher, certain furniture mentioned in the schedule to the deed was settled by Jane Pilcher upon trust for herself for life, and after her death or her husband's upon trust for the survivor; and further, Elizabeth Heselrige Walker, the mother of the said John Henry Walker, covenanted with the trustees that she would by will devise and bequeath one-third of her real and personal estate to the trustees of the settlement upon trust during the joint lives of the said J. H. Walker and Jane Pilcher, to pay the income to Jane Pilcher for her separate use, and after the decease of either of them upon trust if J. H. Walker should be the survivor to convey the said share to J. H. Walker absolutely, but if Jane Pilcher should be the survivor to pay the income to her during her widowhood, and on her decease

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or second marriage upon trust for the children of the marriage in equal shares.

Elizabeth Heselrige Walker, by will dated the 18th November, 1891, left all her property to her executors and trustees upon trust to divide the same equally between her three children, John Henry Walker, Elizabeth Buckly Gerrard, and Margaret Hamilton Guilbride, share and share alike and in case the said J. H. Walker predeceased her, his share was to go to his children. She died in 1879, and her will was proved. Joseph Woodall, one of the trustees of the settlement of 1863 was dead, and the plaintiffs were the children of the marriage. The defendant, in his affidavit in support of his application, stated that he had a good defence to the action on the merits, for that both the parents of the plaintiffs were alive, and the plaintiffs had no interest in any of the property settled except the property covenanted to be left by Mrs. Walker's will, and any such interest was contingent only. He further stated that he had never heard of Mrs. Walker's death until within three years before the action, and no notice of the death was served on the trustees, nor were they asked to get in the one-third of her estate until the month of March, 1894. He further stated that Mrs. Walker's executors, in ignorance of the settlement, paid over one-third of her estate to her son, the father of the plaintiffs, who had afterwards become bankrupt, and was then in straitened circumstances, so that any proceedings to realise the money would be useless.

By order dated the 5th November, 1894, the Master of the Rolls refused the application, and from that order the defendant appealed.

R. F. Harrison, for the appellant:—

The plaintiffs almost all reside out of the jurisdiction, and a number of them in America, and we have a good defence on the merits. A trustee is not bound to take proceedings where they must be ineffectual: *Alexander* v. *Alexander* (1); he is not bound to be constantly inquiring about the property: *Ex parte Geaves* (2). Before the Judicature Act, the Common Law Courts had a different

(1) 12 Ir. Ch. R. 1. (2) 8 De G. M. & G. 291.

practice on these motions, the Exchequer required the general nature of the defence to be set forth, *Shepperd* v. *Beamish* (1), while the Queen's Bench and the Common Pleas were satisfied with an affidavit stating that the defendant had a good defence on the merits. We have here an affidavit setting forth facts, which constitute a good defence.

W. M. Jellett, for the plaintiffs, was not called on.

WALKER, C. :—

I do not think that any sufficient reason has been shown for interfering with the order of the Master of the Rolls. He has held that the affidavit of the defendant is not one satisfactory within the meaning of the rule. It is not necessary on an application of this kind that the defendant should make out in proof a defence to the action; but as he is bound to lay before the Court a "satisfactory" affidavit, I think he must, at least, state facts which suggest some defence.

I am unable to gather from the affidavit any facts which state or suggest a defence to the action. It may be that hereafter the defendant will be able to make out a complete answer to the action. This order in no way prejudices his case in that view. On the materials now before us, I am unable to state that a satisfactory affidavit has been made, and, therefore, I think the appeal must be dismissed.

FITZGIBBON, L.J. :—

I agree with Mr. Harrison, that when a party comes in to get security he is not bound to prove his defence; but, still, "a satisfactory affidavit" must mean an affidavit that satisfies the Court of something. It appears to me that when a defendant applies for security for costs, he must not merely swear that he has a defence on the merits, for that was the old requirement, but he must give some evidence to satisfy the Court that there is a reasonable prospect of his establishing some more or less specific or ascertainable defence. The defendant here is now sought to be made

(1) 8 Ir. C. L. R. Appendix, lix.

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answerable as a trustee. *Prima facie* the trustees were bound to look after this property, and not to leave it derelict on the death of Mrs. Walker. It was their duty to watch for the time of getting it in. No doubt they might show that there was nothing to be recovered, or that proceedings would have been useless, or that something prevented or excused them from doing what was *prima facie* their duty; but the affidavit does not even suggest any specific case by way of defence, and it is in my opinion insufficient.

BARRY, L.J. :—

I do not think that the affidavit is sufficient to justify me in differing from the Master of the Rolls on a question so much within his own discretion. I think that in that Exchequer case of *Shepperd* v. *Beamish* (1), which was relied on by Mr. Harrison, a further examination of the case would show that the marginal note goes too far, because it says that it is enough if there is sufficient stated in the affidavit so as to leave the Court to infer that there may be a defence. I do not think the case goes so far as that.

Solicitor for the plaintiffs: *Jaspar Brett.*
Solicitor for the defendants: *R. H. Orr.*

R. D. M

(1) 8 Ir. C. L. R. Appendix, lix.

IN THE MATTER OF THE ESTATE OF SAMUEL BRADFORD, OWNER AND PETITIONER.

Monroe, J.
1894.

Nov. 13, 16, 20.

Will—Legacies charged on land if personal estate should prove to be insufficient—Devastavit—Incumbrances created by executor also devisee—Laches—Arrangement—Certificate of conformity.

A testator bequeathed his personal estate to S. and two other persons whom he appointed executors upon trust to pay certain legacies, and subject thereto for S. absolutely, and devised and bequeathed all his real freehold and chattel real lands to S., subject as therein-mentioned, that is to say he directed that if the personal estate thereby bequeathed should prove insufficient to pay the legacies the deficiency should be a charge upon the real and chattel real property devised to S. The testator died in 1872, and S. who was the sole acting executor became possessed of the entire real and personal estate. The personal estate was sufficient to pay the legacies in full, but was misappropriated by S., and certain of the legacies were left unpaid, interest thereon being paid to the legatees who had no notice of the *devastavit*. S. mortgaged the lands, and afterwards becoming embarrassed carried an arrangement with his creditors, and obtained a certificate of conformity. The legatees had been returned in the statement of affairs as unsecured creditors, but to this they objected, and had their names struck out, and did not participate in the composition:—

Held, that although the personal estate was originally sufficient, and the deficiency was caused by the *devastavit* of the executor, the unpaid legacies became charged on the lands.

Held, also, that there was no laches on the part of the legatees to postpone them to the incumbrances created by S., and that their rights as secured creditors were not affected by the arrangement proceedings.

ON the 5th December, 1871, the late Mr. Thomas Bradford made his will, and thereby devised and bequeathed to his son, Samuel Bradford, absolutely, all his real, freehold, and chattel real lands, subject and charged as therein mentioned. He bequeathed certain portions of his personal property specifically, and as to the residue thereof he bequeathed it to his wife, his son Samuel, and John William Ellison, whom he appointed executors, upon trust to pay his debts and funeral expenses and the legacies to his wife and children therein mentioned, and subject to such trusts he gave

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the entire residue to his son Samuel, absolutely. He directed that if the personal property so bequeathed should prove insufficient to pay the sums so bequeathed to his wife and children, then the deficiency should be a charge on his real and chattel real property so demised to his son Samuel. The testator died in 1872, possessed of certain landed properties; some held under fee-farm grant, some under lease, and some under tenancies from year to year; and immediately afterwards Samuel Bradford entered into possession of the entire of the real and personal estate. Probate was granted to the three executors, but everything was managed by Samuel Bradford, with whom his mother and some of his unmarried sisters continued to reside. The personal estate left by the testator was quite sufficient, if realised, to pay the legacies in full, but these were not demanded by all the legatees. Some of them were paid, but others remained outstanding, interest being paid thereon after deducting sums in several instances in respect of the sisters' maintenance. After his father's death Samuel expended large sums of money in purchasing the fee in lands of which his father had been lessee or tenant from year to year, and the purchase-money of these lands was mainly obtained on mortgage from the trustees of the Presbyterian Church or from the Bank of Ireland. Afterwards Samuel Bradford became embarrassed in his circumstances, and presented his petition for arrangement with his creditors to the Court of Bankruptcy on the 12th March, 1890. He proposed to pay his creditors 20*s.* in the £ in certain instalments within two years, and this proposal was duly accepted by the required number. The legatees were returned as unsecured creditors. They objected to this and had their names struck out, and they stated to the Court of Bankruptcy that they did not require any composition to be provided for them as they considered themselves creditors secured by the father's land, and had no intention of interfering in the arrangement so far at all events as their legacies were concerned. The arrangement was carried out, the composition was paid to all the creditors who were admitted or who had proved, and the debtor obtained his certificate of conformity. Proceedings for sale were taken in this Court and a receiver was appointed.

The question was now raised by notice and cross-notice of

motion whether the unpaid legacies were charges upon the lands in priority to the mortgages to the Bank of Ireland and to the trustees of the Presbyterian Church. Numerous affidavits were filed, the material substance of which is sufficiently presented in the foregoing statement of facts. At the desire of Monroe, J., Mr. Samuel Bradford was examined *viva voce*, and proved that at the date of the present argument he had no assets of the testator to meet the legacies.

Price, Q.C., and *Stanley, Q.C.*, for the legatees:—

There having been a failure of the personal estate whether from the *devastavit* of Samuel Bradford, the executor, or otherwise, the legacies became a charge on the lands and the legatees have done nothing to forfeit their rights. *Humble* v. *Humble* (1) and *Geary* v. *Beaumont* (2) are decisive authorities that, although the personal estate was sufficient at the death of the testator to pay the legacies, a misappropriation by the executor throws the unpaid legacies on the lands under the terms of will such as that in the present case. See also *In re Massy's Estate* (3), where *Humble* v. *Humble* (1) was cited, and the principle was extended and applied to cases where the executors who committed the *devastavit* were not devisees of the realty: *Howard* v. *Chaffers* (4).

In *Richardson* v. *Morton* (5), Lord Romilly, in deciding against the legatee, draws a distinction which is applicable here. He says (p. 128)—"I have examined the cases which were cited, and am of opinion that in those in which the devisee of the land was also the personal representative who wasted the estate, the identity of the two characters prevented them from raising the defence which has succeeded here." There the words were "be inadequate." Here they are "prove insufficient."

T. Pakenham Law, Q.C., and *J. H. Shaw* for the Bank of Ireland, mortgagees of Samuel Bradford's estate in the lands:—

The legatees having allowed Samuel Bradford, who was primarily liable to them to misappropriate the personal assets of

(1) 2 Jur. 696.
(2) 3 Mer. 431.
(3) 14 Ir. Ch. R. 355.
(4) 2 Dr. & Sm. 236.
(5) L. R. 13 Eq. 123.

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the testator, it would be a fraud upon the incumbrancers of the lands devised to Samuel if they were to be postponed to the legacies: *Thompson* v. *Harrison* (1). The residuary account passed by Samuel Bradford shows that there was an appropriation of part of the assets to answer these legacies, and of that portion he became an express trustee for the legatees, and beyond him they have no claim: *Phillipo* v. *Munnings* (2); *Clegg* v. *Rowland* (3); *Richardson* v. *Morton* (4) is an authority in our favour, and so are *Leahy* v. *De Moleyns* (5), a recent case before the Master of the Rolls, and *Henderson-Roe* v. *Hutchins* (6).

The liability of Samuel Bradford for the *devastavit* was released in the arrangement matter. Again, after twenty-two years have rolled over the Court should hold that the legatees are barred by laches: *Ex parte Chadwin* (7); *In re Queale's Estate* (8).

J. H. Moore, for the trustees of the Presbyterian Church.

Kenny, Q.C., and *Donaldson*, for Samuel Bradford, the owner.

Stanley, Q.C., in reply:—

In *In re Queale's Estate* (8) the Court of Appeal held that the rights of the legatees were unaffected by the equitable mortgage of the executor. Lord Justice FitzGibbon, p. 370, expressly states that a legatee is not guilty of laches by leaving the legacy outstanding. The certificate of conformity only released debts provable in bankruptcy and did not affect a liability such as this.

Nov. 20. MONROE, J.:—

[After stating the facts as above, proceeded]:—

So far back as the year 1891 a motion was instituted to fix priorities, but as matters were very complicated and had not been thoroughly investigated I was only able to make an interim order providing for the distribution of any money which might come into the Receiver's hands, and referring it to a competent gentle-

(1) 2 Br. Ch. Cas. 164.
(2) 2 M. & Cr. 309.
(3) L. R. 3 Eq. 368.
(4) L. R. 13 Eq. 123.
(5) Unreported.
(6) 42 Ch. Div. 305.
(7) 3 Swanst. 380.
(8) 17 L. R. Ir. 361.

man to inquire and report what were the respective values of the fee-simple purchased by Samuel Bradford and the tenancies in the same lands which were the property of Thomas Bradford at the time of his death. The report has been received as to what was then the value of the testator's interests. The entire personal estate of Thomas Bradford is gone, and the legatees claim to have a first charge on those interests of Thomas Bradford. The mortgagees contend that their claim is gone. A large number of notices have been served asking different declarations. I cannot say I approve of this mode of bringing the matter before me. It would have been much better to have instituted a general motion to fix priorities, or to amend the former order, but as all were prepared to argue probably the only questions which can arise I did not wish to postpone the matter further, but I shall take care that no double set of costs is allowed when, after the declarations now sought for, the general order of priorities comes to be settled.

It is now contended by the mortgagees that the legatees have no charge on the land, because at the date of Thomas Bradford's death there was sufficient personal estate to meet their demand. It is clearly settled that such contention could not be sustained even where the executor is not himself the residuary legatee, and that when the executor wastes the personal assets, the legatees can under such a will as the present realize their charge against the lands: *Humble* v. *Humble* (1), *Massy's Estate* (2), *Howard* v. *Chaffen* (3), *Richardson* v. *Morton* (4). Still more untenable is the argument where the executor who commits a *devastavit* is himself the residuary legatee and devisee. In such case, if the argument be sound, the executor has only to make away with the personal estate which was originally sufficient to pay all, and then to insist on retaining the real estate to himself because the legatees, did not at once insist on being paid out of the primary fund.

It is further contended that the legatees, outside the proceedings in the Court of Bankruptcy altogether, have been guilty of such laches as to deprive them of their claim against the real, or chattel real, estate. I see no ground for this contention. The legatees seem to me to have done nothing but what is done every day.

(1) 2 Jur. 696.
(2) 14 Ir. Ch. R. 355.
(3) 2 Dr. & Sm. 236.
(4) L. R. 13 Eq. 123.

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They had charges, as they thought, perfectly well secured on their father's assets in the hands of their brother. They were getting their interest regularly, and they saw no reason to change the security. There were no laches. They owed no duty to anyone to proceed in the first instance against the personal estate. If Samuel Bradford could not produce sufficient money to pay them they could enforce their claim against the real estate.

Again it is argued that their action in the arrangement matter puts them out of Court. Mr. Bradford returned the legatees as unsecured creditors. They did not wish to be mixed up in the arrangement proceedings at all. They looked upon their claim as one affecting their father's assets, and they considered they were well secured on his real estate, whatever had become of the personalty. They therefore did not seek to have the proposed composition provided for them as if a *devastavit* had been committed. They had a right to say there may be a danger in proving—this may be taken as an acceptance of the executor alone as their debtor. Accordingly they washed their hands of the whole matter, relying on their security. They had a right to do so. They believed they had security in the land. If they were wrong in their judgment, they would be the sufferers. But they took good care not to let anyone suppose they had accepted their brother's sole security and waived their claim against the father's estate.

Then Mr. Law refers to the residuary account, and he finds the executor stating a retainer of £5800 for payment of legacies. This, he argued, constituted the executor a trustee, and so far as the persons interested in the assets were concerned amounted to a payment. He referred to *Phillipo* v. *Munnings* (1) but all decided by the case was this—An executor had as a matter of fact set apart a sum of money to meet a legacy and had regularly paid the interest. After a considerable lapse of time the legatee proceeded to recover the legacy, and the executor pleaded the statute of limitation. The Court held no such defence was open to him, as he had constituted himself the trustee of a special fund. This was all. Samuel Bradford in this case had set aside no fund. He deducted the £5800 on paper from the residue, so as to ascertain the amount on which probate duty should be paid. No money

(1) 2 My. & Cr. 309.

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was paid at all to the legatees. Of course if the legatees had in any way misled the mortgagees by pretending the legacies had been paid the matter might have been different. Both the trustees of the Presbyterian Body and the Bank of Ireland, knew that Samuel Bradford had taken his father's estate subject to charges. At the date of the advances no real investigation took place as to whether the charges had been paid. I presume they considered the security ample. Inquiries were subsequently made by the trustees of the Presbyterian Body, and their receipts were produced. The legacies of two of those who have given receipts have been paid, though they do not appear to have been paid when the receipts were given. Mrs. Wood, who also gave a receipt at her brother's instance, and contrary to the fact, would probably, if the money were her own, be prevented from making a claim now. But the money was in settlement and even as regards her own interest in it, there was a clause against anticipation.

I must therefore hold that the several legatees or annuitants whose legacies or annuities remain unpaid have a first charge on the real estate and chattel real lands of the late Thos. Bradford, that is on a tenancy from year to year in the lands of Dowdall's hill, Sportsman's Hall, Moorland and Balriggan, the leasehold interest in Carnbeg, the testator's interest in part of the lands of Cavananore and Aughnavackey, held under a fee-farm grant and two leases, the moiety of Dungooley and Tullyvallen, held under a fee-farm grant, Brandonsfort, Carnmore, and part of Balriggan held under lease, and the lands of Glebe, held under tenancy from year to year. A question has been raised as to whether they are not also entitled to a charge on the fee of these lands. They were church lands in which Samuel Bradford purchased the fee. I take this to be a graft, but if claimed to be a graft the legatees can only claim against the fee subject to the amount paid by Samuel Bradford for the reversionary interest.

Under the original order fixing priorities, a reference was made to determine the value of the several interests of Thomas Bradford, and a report has been received from Mr. Wynne. The Bank of Ireland object to the principle of the valuation on the ground that it is made as of the year 1872. I am of opinion that this valuation is wrong, and that the valuation must be made as of the present

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time. If the parties so desire I shall refer it back to Mr. Wynne to report what would be now the value of the tenancies of Thomas Bradford, assuming they had continued to the present time with all the advantages, if any, which the Land Acts have conferred on them, and what is the value of the fee subject to those tenancies in the lands where Samuel Bradford has purchased the fee?

I must further declare that the trustees of Andrew Bradford are entitled to be paid one moiety of the rents and profits of the lands of Tullyvallen or Dungooley.

I must further direct that the solicitor having carriage be at liberty to take out the conveyances of the fee-simple lands purchased in the Landed Estates Court by Samuel Bradford, and that a proportionate amount of the costs be paid out of the price of the fee-simple of those lands respectively.

I further direct that the solicitor having carriage do prepare a schedule of priorities in accordance with these directions, and institute a motion for payment by the receiver, according to the usual course of the Court.

Solicitor for the legatees: *A. Bell.*

Solicitor for the Bank of Ireland: *De Moleyns.*

Solicitors for the Trustees of the Presbyterian Church: *Carson & M'Dowell.*

Solicitor for the owner: *Henry.*

W. G.

IN THE MATTER OF THE ESTATE OF THE TRUSTEES OF HARRISON.

Monroe, J.
1894.
Feb. 6, 14.

Money lodged in Court under provisional offer—Solicitor—Duty as to investment.

A public department who were anxious to acquire the reversion on a lease which they held, being part of the estate to be sold in this matter, agreed to lodge in Court the sum of £8750 under a written proposal which provided: 1, that the department should continue payment of rent under the lease until a conveyance should be executed by the Court; 2, that the sum to be lodged should be invested in 2¾ per Cents., and the dividends thereon paid to the Secretary of the department to the date of the conveyance; 3, that if good title could not be shown the sum lodged in Court should be repaid to the department.

The money was lodged, but neither the solicitor having carriage nor the solicitor for the department took steps to have it invested:—

Held, that although the solicitor having carriage is responsible, not merely to his own client, but to all persons interested in the property for sale, and to the Court, in seeing that everything in connection with the sale, the fund realised, and its distribution, is properly done, the obligation of causing the fund in the present case to be invested was not, under the special circumstances of the arrangement, so clearly shown to lie on the solicitor having carriage, as to make him personally responsible for the loss occasioned by the non-investment.

MOTION, on behalf of Her Majesty's Principal Secretary of State for War, that Messrs. Wallace & Co., solicitors having carriage of sale, be ordered to lodge in Court the amount of dividends which would have accrued due on the sum of £8750, brought into Court by the War Department on the 31st March, 1893, if the same had been invested in the purchase of New Consols, pursuant to the terms of the proposal for purchase of the Department, accepted on the 28th March, 1893. The circumstances of the case are fully stated by Mr. Justice Monroe in his judgment.

Matthew J. Bourke, and *J. F. Vesey Fitzgerald*, in support of the motion:—

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When the Court makes an order for investment, the solicitor having carriage is the proper person to look after the investment: sects. 56, 67; Rules (1859), 29, 30. The Court holds him in the first instance responsible for any irregularity that may occur: *In re Devereux* (1); *In re Cleary* (2); *In re Assignees of John Frewen* (3); *Batten* v. *Wedgewood Coal and Iron Company* (4). There the question arose as to the liability of the solicitor for the plaintiff for non-investment of the purchase-money. Pearson, J., says, at page 349:—"The conduct of the sale rested with him because he was the solicitor for the plaintiff, and as such he was discharging the duty which devolved upon him, and no other solicitor would have been entitled to charge for that which he was doing. But he was acting as an officer of the Court, and in that character, I conceive, he was liable to the Court for the due discharge of his duty. Until I am corrected by a higher tribunal, I shall hold that the Court has a summary jurisdiction to make a solicitor liable for not properly discharging his duty under such circumstances. I think, therefore, that he is liable to make good to the receiver the loss of interest which has resulted from the non-investment."

Gordon, Q.C., and *Hume*, for the solicitors having carriage:—

Here the War Department obtained privity, and lodged the money themselves. The order was obtained at the urgent instance of the Department. The solicitor having carriage received no notice of the lodgment, and was never required to take steps for investment of the money. The proposal was not complete at the date of the order, and we had no notice that it was ever signed.

The money never ceased to be the property of the Secretary of State for War. In *Batten* v. *Wedgwood Coal and Iron Company* (4), the plaintiff was a debenture holder. He was bound to sue on behalf of all the other debenture holders of the Company, as well as of himself. The sale was completed, and the money brought into Court for the benefit of all the debenture holders. Here the order accepting the proposal is expressly conditional. The depart-

(1) 4 Ir. Jur. 16.
(2) 3 Ir. L. T. R. 101.
(3) 7 Ir. Jur. (N. S.) 88.
(4) 31 Ch. Div. 346.

ment was to continue to pay rent. The person who was to get the income was the person to see after the investment. In no case could the estate be affected by the investment or non-investment, as the dividends would go to the department.

J. F. Vesey-Fitzgerald, in reply :—

The contract was a completed one, subject to rescission if title were not shown: *Watts* v. *Watts* (1); *In re Stirling* (2); *In re Gage's Estate* (3).

MONROE, J. :—

Feb. 14.

Portion of the lands for sale in this estate known as The Kinnegar had been leased to the Secretary of State for War at a rent of £300 a-year. Early in the year 1893 the Secretary of State for War was anxious to purchase the lands comprised in the lease to be used as a rifle-range. The negotiations for the purchase were carried on between the Chief Crown Solicitor acting for the War Office on the one side, and the owner and Messrs. Wallace & Co., the solicitors having carriage, on the other. It was about the middle of March, 1893, ultimately arranged that the War C .ce should offer, and that the owner should accept, a sum of £8750, provided good title were shown. The Chief Crown Solicitor explained that it was of the utmost importance to have the transaction closed before the 31st March so as to get the purchase-money placed on the Estimates. If the money were not then obtained it might not, he considered, be obtained at a future date. The representative of Messrs. Wallace & Co. explained that it would be impossible to have the title investigated and a conveyance made before the 31st March, and I sat specially in Chamber at the request of the solicitor for the War Office to see whether I could allow the sum agreed on as purchase-money to be lodged, although title had not been shown. The matter appeared to be most urgent. After considerable discussion it was arranged that the War Office should be at liberty to lodge in Court the sum of £8750 upon certain terms :—1, That the War Office should continue payment of rent under the lease until a conveyance

(1) L. R. 17 Eq. 217. (2) 3 Ir. Jur. 233. (3) 17 L. R. Ir. 111.

Monroe, J. 1895. *In re* HARRISON'S ESTATE.

should be executed by the Court; 2, That the £8750 should be lodged by the War Department; that same should be invested in 2¾ per Cents, and the dividends thereon paid to the Secretary of State for War to the date of the conveyance; 3, That if good title could not be shown, the sum lodged in Court should be returned to the Secretary of State for War. Directions were given that the terms of the arrangement should be put in writing in the form of a proposal, and that a map of the premises should be added. This was done, and the proposal was provisionally accepted by the order of the 28th March. The course to be adopted when money is lodged to the credit of a matter pending in this Court is that a privity should be obtained from the proper officer of the Court to enable the money to be lodged in the Bank of Ireland. If it is to be invested the receipt for the money and the order directing investment are shown to the proper officer of this Court, who issues a fiat directing the Accountant-General to make the investment, and this is immedialy done by the Accountant-General. Accordingly on the 31st March the Chief Crown Solicitor got the privity and lodged the £8750 in the Bank of Ireland to the credit of the matter; and, believing his duty ended there, took no step to have the money invested himself and served no notice of the lodgment with a request that the solicitor having carriage should do so. He conceived it to be the duty of the solicitor having carriage to direct the investment, and thought no more of the matter. On the other hand the solicitor having carriage considered he had nothing to say to the investment. He was merely concerned with carrying out the sale for the benefit of all persons interested in the estate and having the purchase-money distributed among the incumbrancers and the owner if there was a surplus. The purchase-money, in the event of a purchase being carried out, was in Court. Whether the money was invested or not he could get no more for his clients, and if the money was to be invested the matter should be carried out by those whose interest it was to see it done. Such being the conflict of opinion between the solicitors, assuming that either of them then thought of the matter at all, no investment was made; and no one discovered the fact of the non-investment till the month of Nov., 1894. Several quarter-days passed without payment of dividend

and no remonstrance appears to have been made on behalf of the Secretary of State for War. In the latter end of November last the assistant of the Chief Crown Solicitor called at the office of the solicitor having carriage and requested him to pay the dividends which had been lost by reason of the non-investment. The town agent of the solicitor having carriage replied that he had nothing to do with the investment, and declined to pay anything. This motion has been instituted to compel payment of the lost dividends by the solicitor having carriage.

There is no doubt but that the solicitor having carriage has a duty to perform, not merely to his own client but to all persons interested in the property for sale, whether owner or incumbrancer, and also to the Court, in seeing that everything in connection with the sale, the fund realized, and the distribution of that fund, is properly done. Where property is sold in the Court, and the purchase-money is not lodged within fourteen days, it is the duty of the solicitor to enforce payment, and to take the necessary steps pointed out by General Order XXX. If property be sold and the purchase-money lodged, and questions arise on the schedule which may prevent the distribution of the fund for a considerable time, it is the duty of the solicitor having carriage to take the opinion of the Court as to its investment, in the interests of those to whom he has a duty to perform. I had a case of this kind before me a few days ago where property had been sold immediately before the long vacation and where no steps had been taken to invest the purchase-money. The solicitor escaped responsibility, and the motion was withdrawn when it was shown that he had consulted the owners of at least two-thirds of the residue of a solvent estate, who considered that owing to the then high price of the funds investment would be injudicious. A very good illustration of what is expected from the solicitor having carriage as part of his duty, arose in the case of *Batten* v. *The Wedgwood Coal and Iron Co.* (1). It was a suit by certain debenture holders against the Company. A sale was directed of certain property of the Company on the application of a Mrs. Batten, whose solicitor was a Mr. Musgrave, and the proceeds of the sale

(1) 31 Ch. Div. 346.

Monroe, J. 1895.

In re HARRISON'S ESTATE.

were directed by order of the Court to be invested. The purchase-money was ascertained and duly lodged, and the whole thing was complete. Musgrave neglected to invest the money, and an application was made on behalf of the Receiver, who was a creditor in the matter, to have the solicitor held liable for the loss. It was argued on behalf of Musgrave that he was only responsible to his own client, Mrs. Batten, who had lost nothing by the neglect. The Court, however, held that he was responsible, not merely to his own client, but also to all persons entitled to a share of the fund when realized. His duty was to them also. I have no hesitation in saying that the solicitor having carriage in the present case cannot be held free from blame. He was bound in the interest of his clients to see that the lodgment was duly made, just as much as he would be obliged in ordinary cases to see to the lodgment of purchase-money after an actually completed sale. And if he inquired after the lodgment, and found that the money had not been invested, it would not be too much to expect that he should have the money invested himself, or, if he did not consider this part of his duty, to call the attention of the War Office to their omission. If I had merely to express an opinion on his action, I should certainly say he had been guilty of a great oversight. But I am required in this case to say, not whether the solicitor having carriage has been guilty of an oversight, but whether he has incurred legal responsibility. It is not to be forgotten that the sale was not complete in this case. The money in Court was not the money of the estate representing a complete sale of part of it. It was a kind of deposit until title could be shown if this were possible. The course of lodging the money in Court before completed sale was contrary to all previous practice, and was adopted to meet a pressing exigency of the proposed purchaser. The order for investment in this case might mean one or other of two things. It might mean an undertaking that if the money were lodged the Court through its officer would be responsible for investment; or it might mean if the conditional purchaser lodge the money he was to be at liberty to invest it and take the dividends till the condition had been fulfilled. Copies of the order of the 28th March were taken out by the solicitor having carriage and by the solicitor for the War Office. Under

that order a privity was obtained, and the money was lodged by the solicitor for the War Office. Either of the two might have obtained, without any trouble, a fiat for investment, and neither did so. Is the responsibility to be entirely thrown on the solicitor having carriage? No doubt the order is drawn up as having been made on the application of the solicitor having carriage. As a matter of fact it was drawn up at the urgent request of the purchaser, who was really the moving party all through. But whoever may have been the moving party, is the obligation so clearly thrown upon the solicitor having carriage to make the investment as to render him responsible for breach of duty? There is no such duty created by statute or rule, and there is no practice in existence indicating that it is a duty to the Court, for the simple reason that no such case has ever arisen before. The obligation of showing the legal responsibility of the solicitor having carriage is thrown on those who assert it, and in my opinion the obligation has not been fulfilled. It was stated during the argument that the Secretary of State for War was determined that someone should be held responsible for the loss. I am, for the reasons I have given, of opinion that the solicitor having carriage is not legally responsible; and I am also of opinion that the solicitor acting for the War Department might reasonably have thought that the money would have been invested like ordinary purchase-money if once it was lodged by him. It was an unfortunate oversight, each of two persons considering, and not without reason, that the duty rested on the other. None of us are perfect, and it is not unworthy of remark that the officials of the War Office took eighteen months to discover that no dividends had been paid. In his able reply Mr. Fitzgerald made the point, though he admitted it was a small one, that the solicitor having the carriage was the only person who could get out of the estate the costs of having the investment made. I think it might be fairly answered that there is no pressing reason why the estate should pay the small costs of making an investment, which could only be made on production of the receipt held by the purchaser, and which would enure only for the benefit of himself.

Monroe, J.
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This motion must be refused, and each party must pay his own costs.

Solicitors having carriage: *Wallace & Son.*
Solicitor for the War Department: *Coll.*

W. G.

Appeal.
1894.
Dec. 4.

NAISH, A MINOR (1).

Practice—Appeal—Contempt—Minor matter—Appellant in contempt.

In July, 1894, the Lord Chancellor made an order appointing the father of the minor the guardian of his person and fortune. The mother, with whom the minor was residing, appealed against this order, and removed the minor out of the jurisdiction. The Lord Chancellor then granted an attachment against the mother for her contempt. On the application of the father, the Court of Appeal fixed a day for the hearing of the appeal, and directed the mother to cause the child to be produced in Court on the hearing of the appeal. The mother failed to have the child so produced in Court, and the Court of Appeal dismissed the appeal.

APPEAL by Mrs. Naish, the mother of the minor, from an order of the Lord Chancellor, dated July 4, 1894, whereby Mr. Naish, the father of the minor, was appointed guardian of the person and fortune of the minor, but no immediate order was made as to the custody of the minor.

The notice of appeal was dated July 26, 1894. Subsequent to this date the appellant removed the minor out of the jurisdiction of the Court. On September 3, 1894, the Lord Chancellor granted an attachment against the appellant for her contempt; the attachment, which issued on September 11, 1894, remained in the sheriff's hands unexecuted, and the appellant continued at large in possession of the minor. Under these circumstances the respondent applied on November 26, 1894, that the appeal should be brought into the list of the Court of Appeal, and disposed of. On this application the Court of Appeal made an order fixing

(1) Before PORTER, M.R., and FITZGIBBON and BARRY, L.JJ.

the case for December 4, 1894, and directing the appellant to produce or cause to be produced the minor in Court on that day, without prejudice to any application to the Court as to the appeal, grounded upon the fact that the appellant was in contempt.

Ronan, Q.C., and *Campbell, Q.C.* (with them *Meredith, Q.C.*, and *Joynt*), for the appellant:—

We admit that the appellant is in contempt. The only question is as to the form of the order. We submit that the right order is to stay proceedings on the appeal until the appellant has purged her contempt. *Garston* v. *Garston* (1) is on all fours with this case: an appellant had been directed to produce a minor in Court, and was brought into contempt; the Court refused to hear the appellant, but did not dismiss the appeal. *Gould* v. *Twine* (2) and *Cavendish* v. *Cavendish* (3) are to the same effect. *The Republic of Liberia* v. *Roye* (4) is distinguishable; the principle on which the House of Lords there acted was that the plaintiff by his contempt had rendered it impossible for the case to be heard. In the course of the suit an interlocutory order had been made that the plaintiff should furnish certain information necessary for the defendant's making out his defence. The plaintiff disobeyed this order; his contempt rendered it impossible for the case to be heard, and therefore the Court dismissed the case rather than stay proceedings for ever. This case is wholly different. There is nothing here to make it impossible for the Court to hear this appeal.

Bushe, Q.C., and *D. F. Browne*, for the respondent:—

The appeal should be dismissed. The real subject-matter of this appeal is the custody of the minor. The appellant by her conduct seeks to render the decision of this Court futile, except it be in her favour. The production of the minor in Court as directed is essential to enable the Court to effectuate its order. The appellant having failed to comply with the direction of the

(1) 4 Sw. & Tr. 73.
(2) 22 W. R. 398.
(3) 15 W. R. 182.
(4) 1 App. Cas. 139.

Appeal. 1894. NAISH, A MINOR.

Court, must submit to have her appeal dismissed: *The Republic of Liberia* v. *Roye* (1); *Princess of Wales* v. *Earl of Liverpool* (2).

In *Garston* v. *Garston* (3), the custody of the infant was not the subject-matter of the suit which was brought to obtain a judicial separation. *Cavendish* v. *Cavendish* (4) is distinguishable on the same ground; and even in it we find an intimation that if the wife did not deliver up the custody by the last day of the term, her appeal would be dismissed. *Gould* v. *Twine* (5) was a case of contempt consisting in the non-payment of costs; such contempt did not involve the subject-matter of the suit.

THE MASTER OF THE ROLLS:—

We are all of opinion that the proper order is to dismiss the appeal. We have heard counsel on behalf of the appellant. I am not sure in strictness that we were bound to hear them, but we were glad to get their assistance in reference to the form of the order the Court ought to make. Now it is suggested on behalf of the appellant that the proper order would be that the appeal should stand over until it suits the convenience or pleasure of the appellant to fulfil the condition—not using that word in the sense of a condition precedent—but the condition which was imposed by the order of the Court on the 26th November in reference to the production of the minor here in Court. The matter came on regularly before this Court, and upon that occasion the order was made that the appeal should stand until to-day, and that the appellant should produce, or cause to be produced, the child on the present occasion. That order was made, as I understand from my brethren who were present at the time, and it is plain upon the face of it, because the Court thought that it was necessary in the interests of justice that the minor should be produced within the jurisdiction of the Court, because otherwise no order of the Court in reference to the custody could be made effective, and the result would be that, not owing to any calamity or any unforeseen circumstances, or any matter beyond the control of the appellant, the appeal would be

(1) 1 App. Cas. 139.
(2) 3 Swanst. 567.
(3) 4 Sw. & Tr. 73.
(4) 15 W. R. 182.
(5) 22 W. R. 398.

heard in such a way that no order that the Court could make could in the nature of things be rendered effective. Therefore the present appeal comes on regularly in point of time, on a day named and fixed by the Court, and after an adjudication by the Court that the production of the child and his presence within the jurisdiction of the Court was a matter of essential importance. Now the nature of the proceeding must be considered before we dispose of the form of the order. This is not a suit between parties. There are no parties here in the strict sense at all. The Lord Chancellor, exercising his jurisdiction in reference to minors, acts for the benefit of the minor, and for the benefit of the minor alone. All proceedings in a minor matter from beginning to end are guided wholly by regard to what is for the interest of the minor: and the orders of the Lord Chancellor or the orders of this Court cannot be absolutely final, because if it turn out at any time that owing to a change of circumstances, a change of condition, a new order ought to be made in reference to the custody of the minor, it is always open to make that order. Now, notwithstanding any order that may be made upon the present appeal, or that might have been made if the appeal had gone on, it would still be open to any person—I do not say to the present appellant—to anyone interested in the minor, to bring any question before the Lord Chancellor in reference to the custody of his person, and have it decided. The fact that the present appeal cannot proceed to-day is solely owing to the deliberate default of the appellant, who says:—"I myself will prevent the appeal from being rendered effective, but still will insist upon the matter being kept open indefinitely." The cases that were relied on of *Garston* v. *Garston* (1), and *Cavendish* v. *Cavendish* (2), were both matrimonial cases, in which the question of the custody of minors arose only incidentally; it was not the subject-matter of the suit, but arose incidentally in the course of proceedings for a totally different object; and, although in those cases the form of the order that the Court thought fit to make did leave a discretion and an opportunity to the appellant to obey the order of the

(1) 4 Sw. & Tr. 73. (2) 15 W. R. 182.

Appeal. 1894. NAISH, A MINOR. Porter, M.R.

Court and come in at a later date, that is in point of fact what this Court did upon the 26th November by giving the opportunity of producing the child and making it amenable to the jurisdiction of the Court here to-day. On the grounds that have been suggested by Lord Justice Barry, I am of opinion that these cases have no decisive bearing in reference to an order made in the course of a minor matter, where the only party before the Court really is the minor, and the only question is the interest of the minor. Of course *Gould* v. *Twine* (1) has no bearing on it either; for in *Gould* v. *Twine* (1) the plaintiff, who was in default and in contempt for disobedience in the matter in reference to costs, was in contempt in reference to an order that it was not in his power to obey. And there are several old cases which show that a litigant may bring his case to a hearing notwithstanding disobedience of orders as to costs which it may be impossible for him to pay, on the ground that the law prescribes a time within which cases must be decided. But the principle recognised in *The Republic of Liberia* v. *Roye* (2), and stated in the eloquent language of Lord Hatherley, announces the inherent jurisdiction of this Court, and announces it not one bit too strongly. The Court has the power, wherever it sees that the subject-matter of the suit is of such a nature that the doing of a particular act, such as in this case the production of the child, is absolutely essential in the interests of justice, to impose a term that the appeal shall not be prosecuted unless that is done by the appellant without which the matter cannot be effectually prosecuted. The same principle is recognised in the *Princess of Wales* v. *Liverpool* (3), which has been referred to. These are the main reasons why this appeal cannot be heard. We do not act on the ground of contempt of the Lord Chancellor's order, nor as punishment for contempt of the order of this Court, but on the ground that this Court has decided, and rightly decided, that the production of the minor is essential to the exercise of the jurisdiction which the appellant herself has invoked. Her appeal must be dismissed.

(1) 22 W. R. 398. (2) 1 App. Cas. 139. (3) 3 Swanst. 567.

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FITZ GIBBON, L.J.:—

When this case was before us on November 26, I find that the Registrar's note of Mr. Ronan's argument concludes with this remark:—"This Court has no jurisdiction to order the appellant to attend, but only to direct the minor to be produced." The Chief Justice pronounced the order of the Court accordingly—"that the case should stand for this day week," that is to-day, "for hearing, and let the appellant produce, or cause to be produced, the child in Court."

The words "or cause to be produced" were inserted on the suggestion of counsel for the appellant, because there being an attachment out against her, it seemed scarcely fair to require her to attend in person. But Mr. Bushe was afraid that if this order was obeyed he might be deprived of the right to rely on the previous contempt, and accordingly the further clause was added, viz. "without prejudice to any application to this Court as to the appeal, grounded on the fact of the appellant being in contempt." Speaking for myself, I thought, at the time, that if the child was produced to-day, that "without prejudice" clause would probably result in no[illegible]ing, because the custody of the child was the real subject-matter of the proceedings: the interest of the child was the thing to which alone the Court would look, without regard either to the contempt of the appellant or to the rights of the respondent, and we would dispose of the child as appeared best for him, leaving the question of contempt to be pressed before the Lord Chancellor, whose order had been disobeyed. But now the case having been fixed for hearing to-day, and the order having been made by this Court that the child, the subject-matter of the suit, shall be produced here, to have his custody adjudicated upon, our order is not complied with, no explanation whatever is offered of the child's absence, and we are calmly asked to make an order staying the appeal. It is even suggested that we can do nothing else. Staying it until when? Everyone of the cases cited shows that a stay that may never come to an end, and that will not help to bring the proceedings to an end, is not to be contemplated.

The true basis and object of the procedure appear most clearly

Appeal. 1894. NAISH, A MINOR. Fitz Gibbon, L.J.

in the *Liberia Case* (1), which shows that the Court will ultimately dismiss an action if the plaintiff makes default in a matter essential to its proper and just consideration. *A fortiori*, an appeal must be liable to dismissal for like cause.

There is no available subject-matter for this proceeding in *Naish, a Minor*, when the minor is out of the jurisdiction of the Court. We know how jealously the permission to take wards out of the jurisdiction is guarded by personal undertakings, which are of course to be loyally kept. But here we have to deal with a party who is prosecuting an appeal, nominally in the interest of the minor, but who at the same time has made away with the actual subject-matter of the whole jurisdiction. The direction to produce the child in Court to-day is not a personal condition put upon the appellant; it is the essential condition precedent to the existence or exercise of our jurisdiction. Having been deprived of that by the party who wants to proceed with the appeal, it is perfectly clear to me that we are only exercising the normal jurisdiction that must be inherent in every Court, in dismissing this appeal, when we see that the appellant has wilfully and without excuse taken away the means of doing justice.

BARRY, L. J. :—

I concur. I think that we have jurisdiction to dismiss this appeal, and that we ought to exercise it. As has been stated by the Master of the Rolls and my brother Fitz Gibbon, the question does not arise in a case of litigation *inter partes*, but in a case where what is sought is an exercise of the paternal jurisdiction conferred upon the Lord Chancellor with respect to minor children. One of the principal points of that jurisdiction is the question of the custody of the minor; and in this case there arose a controversy between two parties seeking the custody of the child, one of whom is the father, and the other of whom is the mother, with whom the child is. Well, the Lord Chancellor has decided this controversy in a particular way; he has directed that the child should

(1) 1 App. Cas. 139.

be placed in a custody selected by the Court, and that the custody should not be committed, until further order at all events, either to the father or to the mother. The mother was directed on a particular day to hand over the custody of the child, so that that order might be complied with. She thinks proper not only to disobey that order, but to add to this disobedience the additional general contempt of removing the minor out of the jurisdiction of the Court. In the meantime she has taken an appeal against the order which the Lord Chancellor made refusing to allow her to retain the custody of the child; and, while depriving this Court of any power of effectuating its order so made, she seeks to have the opportunity of litigating the correctness of that order of the Lord Chancellor, so that if she succeeds in her appeal she remains as she is, in possession of the child; but if the order of the Lord Chancellor is affirmed, she can snap her fingers at, and defy, the Court. It seems to me that to hold that we are obliged to go through the farce of keeping suspended in this Court an appeal that never can be made effectual by decree of this Court in any direction but one, and to keep it hanging over the successful litigant, who has already got a decree of the Court below, if not in his favour, at all events adverse to the person claiming the child against him, would put this Court in a position that would render the system of jurisprudence of the country ridiculous. I shall not at all refer to the nature of the particular details of the controversy in this case and the facts connected with it. I will say nothing about it; but it certainly is not an appeal that ought to be suspended over the head of Mr. Naish for an indefinite period, until it suits the convenience, or the caprice, or, if you like, the affection of this lady for her child, to submit to the jurisdiction of the Court, and abide its future decree.

FITZ GIBBON, L.J.:—

The order will refer to the order of November 26, and state the appearance of solicitor and counsel for the appellant; it will also state that the appellant does not produce the minor, that he has been removed from the jurisdiction of the Court by the appellant, that

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NAISH, A MINOR.

she is in contempt for having so removed him and in not having now produced him or caused him to be produced, and it will dismiss the appeal with costs.

Solicitor for the appellant: *W. Lane Joynt.*
Solicitor for the respondent: *James Goff.*

G. Y. D.

Appeal. 1894.

Oct. 29.
Dec. 18.

LOWRY *v.* WILLIAMS (1)

Judgment—Mortgage—Merger.

By a mortgage deed the mortgagor covenanted to pay the mortgage debt on a day named, and (by a separate covenant) to pay interest at £60 per cent., so long as any principal money secured by the mortgage should remain unpaid after the day named, on the said principal sum, or on so much as should, for the time being, remain unpaid.

The mortgagee obtained judgment against the mortgagor for the principal and interest then due:—

Held (affirming the decision of Porter, M.R.), on the authority of *Popple* v. *Sylvester* (22 Ch. D. 98), that the security of the mortgage was not merged in the judgment, but that the mortgagee was entitled to interest at £60 per cent. subsequently to the date of the judgment.

APPEAL from the order of Porter, M.R., dated the 25th July, 1894, refusing an application by William Williams that interest should be allowed to Thomas Joyce, a mortgagee, at the rate of £4 per cent. from the date when the mortgagee recovered judgment against Williams for the amount due on foot of the mortgage.

By mortgage dated the 2nd June, 1892, William Williams, in consideration of £65 advanced, covenanted to pay to Thomas Joyce the sum of £65 and £3 for costs on the 2nd December, 1892, with interest thereon at £60 per cent. per annum, and also all other sums which should from time to time become due from Williams to Joyce in respect of future advances with interest thereon at £60 per cent. And also that as long as principal money secured by the

(1) Before WALKER, C., SIR PETER O'BRIEN, C.J., and FITZGIBBON and BARRY, L.JJ.

mortgage should remain unpaid after the day on which such principal money should become due according to the terms of the mortgage, the mortgagor would pay to the lender interest thereon, or on so much thereof as should for the time being remain unpaid, at the said rate of £60 per cent. by monthly payments on the first day of each month; and the said William Williams demised to Joyce all his estate and interest in the lands of Grange, and county of Meath, derived under the will of his father, and all his other property, wheresoever situate, subject to redemption upon payment of the said sums of £65 and £3, and all interest due thereon, at the rate aforesaid, and all other sums payable under the mortgage, including interest at such rate as aforesaid.

Under the will of his father James L. Williams, the mortgagor was entitled to one-fourth of the residue, which included the lands of Grange, in the county of Meath, and also some house property in Dublin. An action for administration was brought by Joseph Lowry, the executor of the will of James L. Williams, against the children, who were then minors; and a receiver was appointed over the property. William Williams having failed to pay the mortgage debt on the day named for payment, a writ was issued by Joyce against him for the amount due on the 20th February, 1893. Judgment was marked on the 17th April, 1893, but to the writ of *fi. fa.* there was a return of *nulla bona*. On the 4th July, 1893, Joyce obtained an order in the action of *Lowry* v. *Williams* by which the receiver was directed to pay Joyce all moneys coming to William Williams until the full amount of the mortgage and all interest thereon was discharged. Under this order Joyce was obtaining payment of interest on the mortgage after the rate of £60 per cent. On the 24th July, 1894, the defendant Williams applied to the Master of the Rolls for an order that an account might be taken of all sums paid by the receiver to Joyce under the the order of the 4th July, 1893, and that in taking the account the Chief Clerk should be directed to calculate the interest on the principal sum secured by the judgment dated the 17th April, 1893, at the rate of £4 per cent. from the date of the judgment, or in the alternative that the receiver should make payments to Joyce on that basis.

The application was refused, and Williams appealed.

Appeal. 1894.

LOWRY v. WILLIAMS.

Law-Smith, for the appellant:—

The covenant here is merged in the judgment, and the fact of the debtor covenanting to pay £60 per cent. as long as any sum was due, will not keep it alive: *In re European Central Railway Co.* (1); *Arbuthnot* v. *Bunsilall* (2). *Popple* v. *Sylvester* (3) is distinguishable.

Ronan, Q.C., *Wiley, Q.C.*, and *Godley*, for Joyce:—

This case is the same as *Popple* v. *Sylvester* (3); it is a proceeding in the nature of foreclosure, and that latter case was recognised in *Ex parte Fewings* (4). The covenant is to pay interest at £60 per cent. so long as anything remains due.

Dec. 18.

WALKER, C.:—

The question in this appeal is the rate of interest which Mr. Joyce, a mortgagee of William Williams, is entitled to be paid by the receiver, on foot of a mortgage dated the 2nd June, 1892.

By an order of the Master of the Rolls dated the 4th of July, 1893, any moneys payable by the receiver to William Williams in respect of his one-fourth share of the residue under the will of James L. Williams were directed to be paid to Thomas Joyce in discharge of interest and principal due and to become due on foot of the mortgage. Mr. Joyce contends he is entitled to £60 per cent. interest, and so the Master of the Rolls held. The appellant contends that £4 per cent. only is payable.

The mortgage of the 2nd June, 1892, is made by William Williams to Thomas Joyce, and by it the mortgagor, in consideration of £65 and £3 paid and due, covenants that he will pay unto the lender the said sums of £65 and £3 on the 2nd December, 1892, with interest thereon in the meantime at the rate of £60 per cent. per annum; and also, on the day same should become payable, all future advances with the like rate of interest. The deed then proceeds—"And also as long as any principal money secured by this mortgage remains unpaid after the day on which such principal money becomes due according to the terms of this mortgage, or

(1) 4 Ch. Div. 33.
(2) 62 L. T. (N.S.) 234.
(3) 22 Ch. D. 98.
(4) 25 Ch. D. 338.

any promissory note, bill of exchange, or agreement of the mortgagor or otherwise, will pay to the lender interest thereon, or on so much thereof as shall for the time being remain unpaid, at the rate of £60 per cent., or such other rate as may have been expressly agreed on, by monthly payments on the first day of each calendar month, the first payment of interest on each respective sum to be made on the first day of the month next succeeding the day on which such sum shall become payable." By the same deed the mortgagor demises to the lender the lands, hereditaments, and property representing his share in the residuary estate of James L. Williams mentioned in the schedule thereto; to hold for the terms therein mentioned, subject to redemption, in case he should on the 2nd December, 1892, pay the said sums of £65 and £3 and all interest then due thereon at the aforesaid rate, and also, on the day or days on which same should become respectively payable, all other sums payable under the mortgage including interest at such rate or rates as aforesaid.

It appears that on the 20th February, 1893, Mr. Joyce issued a specially indorsed writ against the appellant on the covenant in the mortgage, and on the 17th April, 1893, recovered judgment in default for the sum of £103 19*s.* 6*d.*, of which the sum of £38 19*s.* 6*d.* represented interest.

The deed has not been impeached for fraud, or on any other ground, and the only question argued was whether since, and by reason of the judgment, only £4 per cent. upon it was payable through the receiver. The appellant contends that the covenants for payment of interest have merged in the judgment. The argument for Mr. Joyce is that there is an independent covenant for the payment of interest to accrue after the 2nd December, 1892, under which he is entitled to receive out of the security £60 per cent.

The cases upon this subject, of which there are several, turn upon somewhat fine distinctions, and it will be desirable to examine them carefully. The first I think it necessary to refer to is *Re Agriculturist Cattle Insurance Co., Ex parte Hughes* (1). There an action was brought for £3273 13*s.* 11*d.*, with interest at £6 per cent. on £3000 secured by a promissory note. There was a

(1) 4 Ch. Div. 34, *note*.

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subsequent agreement that the plaintiff should have judgment for £3536 0*s.* 11*d.* and £1 10*s.* costs, that the judgment should not be enforced for two years, and that the judgment should stand as collateral security for £3000 and interest. The judgment was not signed till the 17th April, 1861. The Company being wound up, and a claim to prove in the winding-up being brought in, it was held that Hughes was entitled to interest at £6 per cent. from the 17th April, 1861, by reason of the independent agreement.

A different conclusion was arrived at on different facts in *Re European Central Railway Co.* (1). There, on the 11th October, 1864, twenty debentures were given by a Company, binding themselves to pay to Holden twenty sums of £1000, with interest, at £6 per cent., the principal to be payable on the 11th October, 1865, with interest, in the meantime, half-yearly; and for further securing payment of *such* principal and interest, the Company thereby charged the railway and undertaking with the repayment of the said principal sum and interest. Judgment was recovered on the 25th November, 1865, for £20,636 8*s.* 4*d.* This included a small sum by way of damages for detention of the debt after the 11th October, 1865. The question was whether they could prove for £6 per cent. from the 25th November, 1865, or only £4 per cent. It was contended they could hold the charge for £6 per cent. Bramwell, L. J., said:—"All that the Company bound themselves to pay by that instrument was the sum of £1000 and £60 for interest, by two instalments, on or before the 11th October, 1865. There is no fresh contract evidenced by the forbearance of the creditors, or in any other way, for the payment of any further interest." After judgment the sum recovered was the sole debt. The undertaking was charged with only £1000, and one sum of £60 for interest. That was the debt and secured debt, and it passed *in rem judicatam.* There was no other agreement than that which had been converted into a judgment. The case of *Popple* v. *Sylvester* (2) raised a question in precisely the same form as appears here. There was a mortgage of policies of insurance on the 30th July, 1864, subject to a proviso for redemption on 30th January, 1865,

(1) 4 Ch. Div. 33. (2) 22 Ch. Div. 98.

on payment with interest at £7 per cent. There were four covenants in the deed—1, a covenant for payment on the day named, with interest; 2, in case the £3000 was not paid on the day, the defendant would, "so long as the sum of £3000, or any part thereof, shall remain due on the security of the indenture," pay interest on the £3000, or the portion of it due, at the rate aforesaid. On the 22nd September, 1869, judgment was recovered for £3145 10*s.* 7*d.*, the amount then due for principal and interest, and the question was whether the plaintiff could recover the difference between £4 per cent. and £7 per cent. It was argued that under the specific covenant interest not covered by the judgment could be claimed. Fry, L. J., said:—"I do not proceed on any admission by the defendant, but on my own view of the law, which is that although a personal covenant is extinguished by a judgment upon it, the charge remained notwithstanding the judgment; and therefore the express covenant, 'so long as the principal sum should remain due on the security of the indenture,' continues in force." And accordingly he held that the party was entitled to interest at the contract rate; and he distinguished the case of the *European Central Railway Co.* (1), on the ground that there was in that case no covenant to pay beyond the day fixed for repayment of the principal. *Ex parte Fewings* (2) raised a question intermediate between the last case and the preceding one. There the mortgage deed of an advowson contained two covenants—(1) to pay £2200, with interest at £5 per cent., on the expiration of six calendar months from the day on which the living should become vacant; and (2) if the £2200, or any part thereof, should remain unpaid after that, to pay interest at £5 per cent. so long as the same sum, or any part thereof, should remain unpaid, by equal half-yearly payments. On the 29th July, 1882, judgment was recovered for £2201 7*s.* 4*d.* This included interest at £5 per cent. to the 17th July, the date of the issue of the writ. Sequestration was issued against the benefice, and the question was whether the mortgagee could recover £5 per cent. from the date of the judgment. Bacon, V.-C., held that £5 per cent. could be recovered; and from that decision there was

(1) 4 Ch. Div. 33. (2) 25 Ch. Div. 338.

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an appeal. Fry, L.J., said, in the course of the argument, referring to *Popple* v. *Sylvester* (1) :—"The ground of my decision was, that there was an express covenant to pay interest so long as anything could be recovered out of the security." Cotton, L.J., in giving judgment, speaking of the same case, said :—"That case is not now before us by way of appeal; but, assuming it to have been correctly decided, the covenant there was entirely different from the covenant in the present case. The covenant there was to pay interest at £7 per cent. so long as any money should remain due on the security of the deed; and assuming that decision to have been right, that it remained in force after judgment had been recovered for the principal debt, in my opinion it does not control the present case, where the claim is one of debt, not a claim in an action for redemption or foreclosure." The judgment of Lindley, L.J., is to the same effect; and Fry, L.J., repeats what he said about *Popple* v. *Sylvester* (1), in the course of the argument, and *Popple* v. *Sylvester* (1) was not overruled, but distinguished. The difference between the two classes of cases, such as the *European Central Railway Co.* (2), and *Popple* v. *Sylvester* (1), was expressly recognised. The last case that I am aware of on the subject is *Arbuthnot* v. *Bunsilall* (3). There there was a bond of 9000 rupees, bearing interest at £18 per cent., payable by monthly instalments of 500 rupees, to be continued each month until the whole amount, with interest on the bond, should be finally liquidated; and it contained the following clauses :—"Should I fail to pay any of the above instalments, or quit India before the final liquidation of this bond, I further bind myself to make immediate payment of the whole sum, or such portion thereof then remaining unpaid, together with the interest at the aforesaid percentage. . . . For the due fulfilment of this engagement I do hereby assign, transfer, and make over all my right, title, and interests in the within policy, No. 4386, for 12,000 rupees." There was another bond afterwards in similar terms. On the 13th July, 1887, the writ was issued; on the 24th October, 1887, judgment for principal, with interest at £18 per cent. to the date of judgment, was marked.

(1) 22 Ch. Div. 98. (2) 4 Ch. Div. 33. (3) 62 L. T. (N. S.) 234.

All sums due under the judgment, with interest at £4 per cent. from the date of the judgment, were paid; but the creditor claimed to hold the bonds and the policy as security for the extra interest. Stirling, J., in giving judgment, said:—"The point raised on this summons is a somewhat fine one; but the law on the subject is, I think, as laid down in *Ex parte Fewings*, *Re Sneyd* (1); and I take it from the judgment of Fry, L.J., who has certainly gone as far as any Judge in the direction in which the defendant asks me to go." [He then read his judgment.] "Bearing in mind this principle, I must apply it to the case of these two bonds, and see to what class they belong, that is to say, whether the covenants for payment of interest were merely subsidiary to the covenants for the payment of the principal debts, or independent covenants, so expressed as not to merge in the judgment for the principal sums." After referring to the form of the bonds he then proceeds:—"It seems to me that, upon the construction of these documents, the agreements to pay interest were merely subsidiary to the stipulations for the payment of the principal sums, and that there were no such independent covenants as referred to by Fry, L.J., in *Ex parte Fewings*" (1).

Those cases appear to establish:—1, That if there is a covenant in a mortgage to pay a principal sum and interest at a contract rate on a named day, and no further covenant, a judgment recovered for the principal sum and interest to date merges the debt, and interest at 4 per cent. only on the judgment is recoverable, even though property is assigned as security; 2, that if there is such a covenant as last mentioned, and also a covenant that if the principal sum remains unpaid after the day named, interest at a certain contract rate shall be paid while the principal sum or any part thereof remains unpaid, and judgment is recovered for the principal sum and interest to date, there is nothing left for the subsequent covenant to pay interest to operate upon, as the covenant to pay the principal has been merged and gone, and therefore a claim or action on such subsequent covenant will fail; 3, but if such subsequent covenant is in the form of an obligation to pay interest at a contract rate while the principal money remains due

(1) 25 Ch. Div. 338.

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on the security of the indenture or equivalent words, and property has been mortgaged or charged to secure the loan, and the claim is to realize the subsequent interest at the contract rate out of the security, then the subsequent covenant is independent, and must have full effect given to it as against the property charged or its proceeds.

The distinction is, as Stirling, J., in effect, says, a somewhat fine one; but the cases establish it, and in three Courts it has been either laid down or recognised as valid.

Apply these rules to the security before the Court. There is first a covenant to pay the principal with interest at a named day; there is a distinct covenant to pay interest at an agreed rate while any principal money secured by the mortgage remains unpaid, and the mortgagee is seeking payment out of the security. There is no distinction between the form of the covenant here and that in *Popple* v. *Sylvester* (1)—"So long as the sum of £3000 or any part thereof shall remain due on the security of this indenture."

Under these circumstances, I am of opinion that the point is ruled by authority which has been reviewed but not impeached, and that the appeal should be dismissed.

SIR PETER O'BRIEN, C.J.:—

I concur with the Lord Chancellor, and I retain the opinion which I formed of this case at the outset. The case is undistinguishable from *Popple* v. *Sylvester* (1). The covenant to pay interest is just as much a separate covenant as the covenant in *Popple* v. *Sylvester* (1). The decision in that case has not been impeached, and we must accordingly affirm the judgment of the Master of the Rolls.

FITZ GIBBON, L.J.:—

I agree that this case cannot be distinguished from *Popple* v. *Sylvester* (1), which has been recognised, though distinguished, in *Ex parte Fewings* (2). But I confess that the distinction between the English cases is very fine; and I think that it would have been a more satisfactory principle to lay down that every covenant

(1) 22 Ch. Div. 98. (2) 25 Ch. Div. 338.

for the payment of interest upon a debt is "subsidiary" to the covenant for payment of the principal, and that when the principal has passed into *rem judicatam*, no larger sum should be recoverable, for either principal or interest, than what was recoverable under the judgment. Such a principle would be in accordance with the reasoning of Lord Bramwell in the *European Central Railway Company* (1); and though *Popple* v. *Sylvester* (2) was recognised in *Ex parte Fewings* (3), Lord Justice Fry was then a member of the Court of Appeal; and the other members of the Court distinguished, rather than adopted, his previous decision, which I find it difficult to reconcile with what seems to me to be a corollary from Lord Bramwell's *dictum* that "there cannot be two debts"—namely, that "the sole debt between the parties" cannot bear two rates of interest.

The covenant in *Arbuthnot* v. *Bunsilall* (4) does not clearly appear to me to be less "subsidiary" than the covenant here; and I should prefer to follow Stirling, J., if I could do so, without disregarding *Popple* v. *Sylvester* (2), as recognised by the English Court of Appeal.

BARRY, L.J.:—

I had the advantage of reading the judgment of the Lord Chancellor as well as hearing it, and I entirely agree with it. We are not in a position to overrule *Popple* v. *Sylvester* (2), which has been recognised in the Court of Appeal in England. As to the distinction drawn by Stirling, J., in *Arbuthnot* v. *Bunsilall* (4), it seems to me unintelligible, and I agree with the Lord Chancellor and the other members of the Court that this case is ruled by *Popple* v. *Sylvester* (2).

Solicitor for W. Williams: *J. Trevor Lowry.*
Solicitor for T. Joyce: *Tracey.*

R. D. M.

(1) 4 Ch. Div. 33.
(2) 22 Ch. Div. 98.
(3) 25 Ch. Div. 338.
(4) 62 L. T. (N. S.) 234.

V.-C.
1895.

Jan. 30, 31.
Feb. 1, 2, 6.

PORTER *v.* WALSH.

(1894. No. 696.)

Donatio mortis causa—*Deposit receipt.*

A deposit receipt unendorsed is a good subject-matter of a *donatio mortis causa*.

The principle of *Duffield* v. *Elwes* (1 Bli. N. S. 497) applied.

Action to have it declared that two deposit receipts, dated 11th October, 1893, and 6th January, 1894, for £6000 and £450 respectively, deposited with the Bank of Ireland by Eliza Ryan, otherwise Lea, deceased, and all interest accrued thereon were effectively given by the said Eliza Ryan, deceased, to the plaintiff as a *donatio mortis causa* and that the cash and interest represented by same did not form part of the personal estate of the said deceased at the time of her death, and further that the defendants, the executors of the deceased, might be ordered to endorse the said deposit receipts to the plaintiffs, and if necessary that the personal estate of the said Eliza Ryan might be administered by the Court.

The deposit receipts had been given to the plaintiff by the deceased in the illness of which she died a few days afterwards. The deposit receipts were not endorsed. The deceased made a will, dated 13th September, 1877, of which probate had been granted to the defendants. In her last illness deceased gave instructions for a new will, which was drafted, but not executed by the deceased, under which the plaintiff was given all the property of deceased save £1000 intended to be given to charities.

The defendants traversed the delivery of the deposit receipts and alleged that the deceased was, as the effects of excessive drinking, incapable of making a valid *donatio mortis causa*, and pleaded that the deposit receipts could not by transfer unendorsed become the subject of a *donatio mortis causa*. By a counterclaim the defendants asserted that the moneys deposited were assets of the

deceased and that they were entitled to possession of the receipts, and claimed damages for their detention.

The Right Hon. J. Atkinson, Q.C., Ronan, Q.C., and *Jefferson*, for the plaintiff :—

In no case has it been suggested that want of endorsement makes a *donatio mortis causa* bad: *Duffin* v. *Duffin* (1). *In Duffield* v. *Elwes* (2) a mortgage was held a good subject of a *donatio mortis causa*. In *Amiss* v. *Witt* (3) a deposit note was held to pass by a *donatio mortis causa*.

The Attorney-General (*The Mac Dermot, Q.C.*), *Sullivan, Q.C., Bushe, Q.C.*, and *Healy*, for the defendants :—

We admit that a deposit receipt if endorsed may be the subject of a *donatio mortis causa*, but none of the authorities deal with the question of delivery of an unendorsed deposit receipt. In *Amiss* v. *Witt* (3) the report is silent as to whether the receipt was endorsed. *Thompson* v. *Heffernan* (4) decided that it is essential to the validity of a *donatio mortis causa* that the money or subject of the gift should be actually handed over. In all the cases where the property was held to pass, nothing remained to be done by the donor to entitle the donee to payment. One of the conditions upon which these deposit receipts were issued was that they should be endorsed, and both the deceased and the plaintiff were well aware of the necessity for endorsement. The words of gift deposed to do not show an intention to benefit the plaintiff: *Cosnahan* v. *Grice* (5); *Gardner* v. *Parker* (6); and the delivery was followed by no expressions of thanks: *M'Gonnell* v. *Murray* (7).

The following cases were also referred to :—*Dunne* v. *Boyd* (8); *Moore* v. *Moore* (9); *Cassidy* v. *Belfast Banking Company* (10); *Veal* v. *Veal* (11); *Witt* v. *Amiss* (12); *Snellgrove* v. *Baily* (13); *Moore*

(1) 44 Ch. Div. 76.
(2) 1 Bli. (N. S.) 497.
(3) 33 Beav. 619.
(4) 4 Dr. & W. 285.
(5) 15 Moore P. C. 215.
(6) 3 Mad. 184.
(7) Ir. R. 3 Eq. 460, at p. 467.
(8) Ir. R. 8 Eq. 609.
(9) L. R. 18 Eq. 474.
(10) 22 L. R. Ir. 68.
(11) 27 Beav. 303.
(12) 1 B. & S. 109.
(13) 3 Atk. 214.

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v. *Darton* (1); *Hills* v. *Hills* (2); *Austin* v. *Mead* (3); *Clement* v. *Cheesman* (4); Williams on Executors, 9th ed., p. 685.

THE VICE-CHANCELLOR:—

In this case a comparatively narrow point is involved, and one which is entirely a question of fact. The record consists of a very simple statement of the facts of the case by the plaintiff in the action. A defence to that has been put in, which in the first place traverses and puts on proof a number of statements which are comparatively unimportant. But then in the third paragraph there is a very important, and serious, and grave charge put forward. The defendants say that on the 6th January, 1894, and at the time of the alleged tradition of said deposit receipts to the plaintiff, the said Eliza Lea, otherwise Ryan, was not competent to perform important acts of business, and that from the continued use of stimulants she was not capable to make a valid *donatio mortis causa*, nor did she understand the effect of the alleged delivery of the said deposit receipts to the plaintiff. They also plead that the deposit receipts were not endorsed to the plaintiff. They also contend that the said deposit receipts could not by transfer unendorsed, or, as in the said paragraph alleged, become the subject of a valid *donatio mortis causa*. The defendants submit that the plaintiff is not entitled to a declaration in accordance with the statement of claim, and so-forth, and the defendants put in a counterclaim for a declaration that the said deposit receipts and the money represented by same form part of the assets of the said Eliza Lea, and the defendants claim that the said deposit receipts should be handed over by the plaintiff to them as executors of the will of the said Eliza Lea.

In the first place, it may be necessary very shortly to express the opinion I take of the law in this case. It is contended that a deposit receipt for money deposited in a bank, even in the ordinary form, if it be unendorsed by a person to whom the money when due would be payable, could not be the subject of a *donatio mortis causa*, and it is also contended by Mr. Sullivan that the particular form of this deposit receipt takes it out of

(1) 4 De G. & S. 517.
(2) 8 M. & W. 401.
(3) 15 Ch. D. 651.
(4) 27 Ch. D. 631.

the decisions that he thought might possibly be applicable to the first question that I have stated. In my opinion neither of these contentions is well founded. I think that from the time of the decision of the House of Lords in the case of *Duffield* v. *Elwes* (1), the law has been put upon a clear and intelligible basis, and it was there decided that an instrument, the property in which does not pass by delivery of the instrument, may be a good subject of a *donatio mortis causa*, and moreover that the familiar doctrine of this Court that the Court will not interfere in the absence of consideration to complete a gift to a volunteer, has no application to a case of *donatio mortis causa*. There was a doubt whether a *donatio mortis causa* did not come within the ordinary and general principle, but the House of Lords have set that doubt at rest by the decision in that case in the terms which I have stated. Of the cases that have been referred to and relied upon by counsel for the defendants there was not a single one produced in which it was held that an unendorsed deposit receipt could not be a subject of a *donatio mortis causa*.

In the case of *Cassidy* v. *Belfast Banking Co.* (2) the receipt was marked on the face of it "not transferable," and notwithstanding it was held that the deposit receipt in that form was a valid subject of a *donatio mortis causa*. Then came the important case of *Duffin* v. *Duffin* (3), where the question was whether a deposit note which bore upon the back a form of cheque directing the mode of payment, "Pay self or bearer," came within the rule. There it was questioned whether an unpresented cheque could be the subject of a *donatio mortis causa*. The report is silent as to whether the receipt itself was endorsed, but I assume that it was not. Whether endorsed or unendorsed it was held there that notwithstanding the cheque the gift amounted to a donation of the deposit receipt and not of the cheque, and that the receipt was a good subject of a *donatio mortis causa*. I cannot see why on principle an unendorsed deposit receipt should not be a good subject of a *donatio mortis causa*. It comes in my opinion within the rule in *Duffield* v. *Elwes* (1), and is a good subject of a *donatio mortis causa*, notwithstanding the words appended to it, "This document must be endorsed," by so-and-so before payment.

(1) 1 Bli. (N. S.) 497. (2) 22 L. R. Ir. 68. (3) 44 Ch. D. 76.

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[THE VICE-CHANCELLOR then proceeded to deal with the issues of fact raised by the pleadings, and held, on the evidence, that the deceased had, in contemplation of death, given the deposit receipts to Miss Porter for her own benefit, and that the allegation that the deceased was, from the effects of drinking, incapable of making a valid *donatio mortis causa* was quite unfounded].

Solicitor for the plaintiff: *W. J. Shannon.*
Solicitor for the defendants: *P. A. Chance.*

T. H. M.

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IN RE CARRIGE AND M'DONNELL'S CONTRACT.

(1894. No. 1015.)

Local Registration of Title (Ireland) Act, 1891 (54 & 55 *Vict. c.* 66), *s.* 18—*Land recorded under the Record of Title Act (Ireland)*, 1865 (28 & 29 *Vict. c.* 88)—*Dealing after 1st January*, 1892—*Rules*, 21*st December*, 1891, *Rule* 20—*Vesting order—Closing of record—Vendor and purchaser—Duty of vendor—Objection going to root of title—Time condition.*

An order, under the Trustee Act, 1850 (13 & 14 Vict. c. 60), appointing new trustees, and vesting lands in them, is a dealing with the land by conveyance, mortgage, or otherwise, within the meaning of Rule 20 (Rules of the 21st December, 1891), under the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66).

Where, after the 1st January, 1892, there has been such a dealing with land recorded under the Record of Title Act (Ireland), 1865 (28 & 29 Vict. c. 88), although the record under that Act has not been closed, or a new folio opened under the Local Registration of Title (Ireland) Act, 1891, and the Rules thereunder, the recorded owner is precluded from dealing with the land under the old record, and from recording acts thereunder.

Accordingly, where the persons recorded as owners under such a dealing, without having the old record closed or a new folio opened, agreed to sell the land:—

Held, that they, and not the purchaser, were the proper persons to procure the old record to be closed and a new folio opened; that until this was done they had no title to give; and that an objection on this ground went to the root of the title, and was not too late, though not made within the time stipulated for objections.

Summons under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78).

By his will dated the 27th May, 1884, and a codicil thereto, Sir John Bradstreet devised to trustees, amongst others, his lands in the county of Galway, with a direction to sell. The testator died on the 21st November 1889. One of the trustees being dead, and the other declining to act, by an order of the Vice-Chancellor dated the 14th February, 1893, under the Trustee Acts, 1850 and 1852 (13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55), John Carrige and Anna Matilda Bradstreet were appointed trustees of the will and codicil, and the lands were vested in them upon the trusts thereof.

On the 5th October, 1894, John Carrige and Anna Matilda Bradstreet caused the Galway property to be put up for sale by auction in six lots. The rental and particulars stated that the lands were held in fee-simple and that the title had been recorded. The seventh condition of sale provided that all objections and requisitions in respect of the title or the abstract or particulars, or the conditions or anything appearing therein respectively, should be stated in writing and sent to the vendors' solicitors within seven days from the delivery of the abstract, and that all objections and requisitions not sent within that time should be considered to be waived.

Martin M'Donnell became the purchaser of lot 3 for £400.

An abstract of title was furnished by the vendors, the only entry on the record of title after the 1st January, 1892, being the following:—

Recorded 7th June, 1894.—Folio 489.

Pursuant to an order of the Court, dated the 7th day of June, 1894, and the documents therein referred to, John Carrige, of 10, Synnott Place, in the city of Dublin, Esquire, and Anna Matilda Bradstreet, of Castilla, Clontarf, in the county of Dublin, spinster, are recorded as owners as trustees for sale of the estate recorded on Folio 489, subject as above stated.

The purchaser twelve days after the delivery of the abstract furnished objections and requisitions as follows:—

The title to the lands purchased is under the Record of Title (Ireland) Act, 1865, and the record has not been closed in pursuance of Rule 20, made in

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pursuance of the Local Registration of Title (Ireland) Act, 1891, notwithstanding that there has been a dealing with the recorded land since 1st January, 1892.

The purchaser requires that the record shall be closed, and that the title shall be registered under the Local Registration of Title Act, 1891.

The vendors must further produce to the purchaser a land certificate, showing their title, and procure the concurrence of all persons appearing from said certificate to have an interest in the lands.

The vendors sent the following reply :—

Subject to the vendors' right to object, by reason of the requisitions on title not being furnished within seven days, pursuant to paragraph 7 of conditions of sale and without prejudice thereto.

The order to record the trustees as owners is not a dealing within the meaning of the Registration of Title Act, and even if it were, it relates back to the will of Sir John Bradstreet, which dates at his death on the 21st November, 1889, and therefore before the 1st January, 1892. In this view the officials in the Registration of Title Office concur.

When the conveyance to the purchaser is completed it may be registered under the Registration of Title Act, or the title withdrawn from the registry.

The vendors will only furnish the purchaser with the documents mentioned in condition 9 of the conditions of sale.

The mortgagees must, of course, release where not paid off.

The purchaser made a further requisition, as follows :—

The dealing primarily relied on by the purchaser as the event which closed the record is neither the order to record the trustees as owners, nor the devise by the will of Sir John Bradstreet, but the order of the Vice-Chancellor, dated the 14th February, 1893, appointing John Carrige and Anna Matilda Bradstreet new trustees of the said will, and vesting the lands subject to the trusts of said will in such new trustees. The said order operates as a conveyance of the said lands, and was therefore a dealing with the lands within the meaning of the Act.

Unless the vendors comply with the purchaser's requisitions he must take such proceedings as he may be advised.

The vendors replied :—

The vendors rely upon the 7th condition of sale, and contend that the purchaser has waived all objections and requisitions.

Without prejudice to above, the vendors (in addition to the matters set forth in their reply to the original requisitions) rely upon the fact that the registering authority, having considered the vesting order of the 14th Feb., 1893, decided that no case had arisen to require the closing of the record, pur-

suant to Rule 20, and consequently the provisions of sect. 18, sub-sect. 3, of the Local Registration of Title (Ireland) Act, 1891, apply to this case.

If the purchaser's requisitions are not withdrawn within four days from this date the vendors will issue a summons under the Vendor and Purchaser Act, 1874.

The vendors now applied for a declaration that the purchaser's objections and requisitions had been sufficiently answered, and that he was precluded by the seventh condition of sale from making same, and that good title had been shown in accordance with the particulars and conditions (1).

It was stated that some difficulty had arisen as to recording the order of the 14th February, 1893, and that an order had to be obtained from Monroe, J., directing this to be done; that when the record was written up for the purpose of recording the vendors as owners as trustees for sale their solicitor communicated with the Registrar of Title, and that he was of opinion that no case had arisen to close the record, that there was no necessity to register the title, and that the more convenient course would be to merely

(1) Sub-sections 1, 2, and 3 of section 18 of the Act of 1891 are as follows:—

Sect. 18, sub-sect. 1: No title shall, after the commencement of this Act, be recorded under the Record of Title Act (Ireland), 1865.

Sub-sect. 2: Provision shall be made by general rules for the registration under this Act, without cost to the parties interested, of all titles recorded under the Record of Title Act (Ireland), 1865, and care shall be taken in such rules to protect any rights acquired in pursuance of recording under that Act.

Sub-sect. 3: Until a title, recorded under the Record of Title Act (Ireland), 1865, is registered under this Act, the former Act shall apply thereto in the same manner as if this Act had not passed.

Rule 20 (Rules 21st December, 1891) is as follows:—

20. On the occasion of any dealing with "recorded land" after the 1st of January, 1892, whether by conveyance, mortgage, or otherwise, the record as to that land shall be closed, and a new folio opened therefor, in the register created by the Act, on which shall be preserved all rights appearing on the Record; and the central registering authority shall give notice of the closing of the record, and of the transfer of the premises to the register, to all persons appearing on the record to be interested in the premises, and to any others in whom any interest may appear to exist. If the record has not been written up the cost of showing the person entitled to be recorded as owner must be borne by the applicant, but all other costs of such transfer shall be paid by the Treasury.

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write up the record, and when the sales had been carried out the purchasers of the several lots could record their conveyances, have the record closed in respect of the lots purchased by them, and have the title transferred to the new register should they so desire.

Meredith, Q.C. (with him *W. F. Kenny*), for the vendors:—

This is land recorded under the Record of Title Act (Ireland), 1865 (28 & 29 Vict. c. 88). The record has not been closed, or a new folio opened therefor in the register created by the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), pursuant to Rule 20 of the Rules under the latter Act, 21st December, 1891; the title therefore has not yet been registered under the Act of 1891, and the earlier act applies—Local Regis- of Title (Ireland) Act, 1891, section 18 (3). The registering authority was of opinion that the order of this Court was not a "dealing whether by conveyance, mortgage, or otherwise" under Rule 20, but even if it were, it would not of itself have closed the old record. Until this has been done by the registering authority by the giving of notices, &c., as directed by Rule 20, section 18 (3) of the Act of 1891 applies, the title must be dealt with under the earlier Act, and neither party is prejudiced. There is nothing in the Act or Rules to compel the vendors to adopt the new system. The recorded owner has no voice in the closing of the record or transferring the title to the new register, and no power to interfere in reference to these matters. Contrast with the provisions as to this section 20 of the Act, and Rules 22 and 23. If the registering authority has fallen into an error the vendors are not responsible. The order of the 7th June, 1894, directs that the trustees be recorded as owners, but there is no direction as to closing the record. The purchaser is seeking to make the trustees pay the costs of such closing. Moreover, the requisitions are late under condition 7; they do not go to the root of the title: In *Re Molyneux and White* (1).

[Counsel referred to several of the sections of the Act of 1891].

(1) 13 L. R. Ir. 382; 15 L. R. Ir. 383.

O'Connor, Q.C., for the purchaser:—

The objection is one going to the root of the title, and the purchaser is not precluded by the time condition: *In re Tanqueray-Willaume and Landau* (1). The vesting order is a dealing within the meaning of Rule 20. It has the same effect as a conveyance: Trustee Act, 1850, sect. 34. The occasion therefore arose for the closing of the record which was opened under the Record of Title Act. On the recording of the vesting order the record became, *ipso facto*, closed under the Local Registration of Title Act. There can be no further dealing until a new folio is opened under this Act. Further, a conveyance cannot be prepared until a folio is opened. The conveyance must refer to the folio: Form No. 14, Rules 21st December, 1891. The vendors are the only persons who can apply to have a new folio opened. The purchaser will not be in privity with the estate until he gets his conveyance.

Meredith, Q.C., in reply:—

The purchaser can, after the execution of his conveyance, produce the same to the registrar, and call on him to close the record. Even now, as equitable owner, he is entitled to require the record to be closed. There is no automatic closing of the old record, nor would the closing thereof preclude a dealing with the land. Until the title is registered under the new Act, the provisions of the former Act apply: sect. 18, sub-sect. 3. As to the form of the conveyance there can be no difficulty, as until such registration the conveyance must be one in accordance with the old system. The requisitions are late. In the case of *In re Tanqueray-Willaume and Landau* (1) the vendors had no title at all to sell; here the question is one merely of convenience, and the condition is binding.

Dec. 21.

THE VICE-CHANCELLOR:—

The question submitted for decision in this case arises upon the Local Registration of Title (Ireland) Act, 1891, and the Rules made thereunder. The sale was of land recorded under

(1) 20 Ch. Div. 465.

V.-C. 1894.

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the Record of Title (Ireland) Act, 1865. The premises, the subject of the sale, were devised by the will of Sir J. Bradstreet to trustees for sale. He died in the year 1889. By an order of this Court of the 14th February, 1893, the vendors were appointed new trustees of the will, under the Trustee Act, 1850, and the estate of the original trustees was, by the same order, vested in them upon the trusts of the will. Some difficulty appears to have been made as to recording this order as a conveyance of the land upon the record of title under the Act of 1865, which necessitated an application to the Land Judge, who made an order, dated the 7th June, 1894, to record the new trustees "as owners as trustees for sale;" and an entry of the vesting order was made accordingly on the register of 1865, by which they appear as the recorded owners of the lands. They sold one lot of these lands to Mr. M'Donnell. An abstract of title was furnished, in reference to which the purchaser delivered requisitions, with one of which only we have now to do, namely, that which objected that the record of title under the Act of 1865 had not been closed according to the 20th Rule under the Act of 1891. That Rule is as follows :—[His Lordship read the Rule].

It was made to carry out the policy of the Act of 1891, which was to get all recorded lands placed upon the register under that Act, and to terminate at an early period all further recording of dealings with such land under the Act of 1865. The mode adopted was, that as soon as any dealing with land should take place after the Act of 1891 came into operation, the register under the Act of 1865 should be closed, and a new folio opened for such land in the register created by the Act of 1891.

In answer to the purchaser's requisition the vendors contended that the registering authority, having considered the vesting order of 14th February, 1893, had decided that no case had arisen to require the closing of the record pursuant to Rule 20, and that consequently the provisions of sect. 18, sub-sect. 3, of the Act of 1891 did not apply to this case. It would seem that this must have been a mistake as to what is represented as a decision of the registering authority; for it is impossible to contend that an order of this Court made under the Act of 1850, or made now under the Trustee Act, 1893, upon the appointment of new trustees, is

not a dealing "whether by conveyance, mortgage, or otherwise" with the land so vested. Such a vesting order has the full operation of a conveyance of the estate of the former trustees to the new, and the 34th sect. of the Act of 1850, under which the order was made, expressly enacts that such order shall have the same effect as if the persons who before such order were the trustees had duly executed all proper conveyances and assignments of the lands for the estate so vested. This proposition was so untenable that it was abandoned by the vendors' counsel.

It follows that a dealing with the land by conveyance did take place after the 1st January, 1892, upon which the old record should be closed under Rule 20, and that in order to bring the land on the register of 1891 a new folio should be opened for the land in the register created by the Act, on which should be preserved all rights appearing on the old record. The question then came to be, whose duty it was to have this done, each party contending it was the duty of the other. The purchaser contended, I think with fair reason, that it was not his duty; that, in fact, he could do nothing as to his conveyance till the new record was opened, and that all power to transfer the land to him under the Act of 1865 was at an end, and that the vendors had no title to give him till they completed their own by bringing the land on the new register. The vendors contended that there must be some formal act done by the Registrar to close the old record, and that until that was done they were at liberty to deal with the land on the register of 1865. I do not think so. The Rule does not say "shall be closed *by the Registrar*," and it seems to me that the words mean that thenceforth no further entry shall be made therein, and that after the dealing with the land mentioned in the Rule the recorded owner on the old register should be precluded from any dealing with the land under that register. The vendors, however, contend that by sect. 18, sub-sect. 3, of the Act of 1891, the Act of 1865 still applied to the land as if the Act of 1891 had not been passed, as the title had not been recorded under the Act of 1891. If that sub-section were to be given so wide an operation, it appears to me that it would be brought into conflict with Rule 20, which provides with the force of a statute that upon the dealing taking place the record of 1865 shall be then and there closed.

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In my opinion it would be quite inconsistent with this to hold that until the new record was opened, which, from the nature of the enquiries to be made for the preservation of subsisting recorded rights, might occupy a long time, the owner on the old register may go on dealing with the land and getting his dealings still recorded on the old register. This would be contrary not only to the letter but to the policy of the Act, and would lead to much inconvenience and confusion. It seems to me that it was intended to preclude the registered owner from recording acts under the old register which were intended to be recorded only upon the new.

Under such circumstances I think that a purchaser should not be compelled to complete his purchase till this difficulty is removed, and that the vendors are the proper persons, if not the only competent persons, to effect this.

An objection was raised to the requisitions as being too late, but I consider the objection too serious to bind the purchaser by the time condition. I think it goes to the root of the title, as, until the vendors have got themselves recorded on the register of 1891, they have no title to give.

I must therefore dismiss the summons with costs.

D. M'C. M.

Appeal. 1895. Jan. 17.

The vendors appealed.

Meredith, Q.C., and *W. F. Kenny*, for the appellants.

O'Connor, Q.C., for the respondent.

THE COURT OF APPEAL (Walker, C., and Fitz Gibbon, and Barry, L.JJ.) affirmed the decision of the Vice-Chancellor, and dismissed the appeal with costs.

Solicitors for the vendors: *O'Reilly & Sons.*
Solicitor for the purchaser: *Farrell M'Donnell.*

G. Y. D.

IN RE BELFAST AND NORTHERN COUNTIES RAILWAY CO.; EX PARTE GILMORE.

M. R.
1895.
March 4.

(1895. No. 23.)

Costs—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *sect.* 82—"*Costs of conveyance*"—*Local Registration of Title Act*, 1891 (54 & 55 *Vict. c.* 66)—*Registration of vendor's title.*

A Railway Company purchased, under their compulsory powers, part of lands bought by the owner under the Land Purchase Acts, subject to an annuity payable to the Land Commission. The vendor had not registered his title to the lands, pursuant to the Local Registration of Title Act, 1891, and the Company required this to be done, and the title was registered by the owner accordingly:—

Held, that the Company was bound to bear the cost of such registration as "costs of conveyance," under sect. 82 of the Lands Clauses Consolidation Act, 1845.

SUMMONS.

This was a summons on behalf of Robert Gilmore to review the taxation of the Taxing Master, who had disallowed three items in the bill of costs furnished by the applicant's solicitors to the Railway Company, which were as follows:—(33), Fee on Registration of Title, £2 2*s.*; (34), Paid for searches, £1 5*s.* 11*d.*; (35), Paid Registration Fees, 14*s.* 6*d.*

The facts were as follows:—Robert Gilmore, being tenant of 44A. 0R. 6P., in the county of Londonderry, purchased the fee simple of the lands under the Land Purchase (Ireland) Acts, and obtained a vesting order from the Irish Land Commission, dated the 25th October, 1890, subject to an annuity payable to that body. In the year 1891 the Belfast and Northern Counties Railway Company, pursuant to powers conferred by the Belfast and Northern Counties Railway Act, 1890, took 3A. 1R. 16P. of the said lands, and compensation was assessed by an arbitrator as provided by the Railways (Ireland) Acts. An abstract of title having been furnished, the solicitors for the Company, finding

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In re Belfast and N. Counties Railway Co. *Ex parte* Gilmore.

that Robert Gilmore had not registered the lands as required by the Local Registration of Title Act, 1891, sect. 22, required him to register them under that Act. This was done, and a conveyance was executed by him to the Company, the Irish Land Commission joining in the conveyance for the purpose of releasing the lands taken from the annuity, and this conveyance was registered by the Company pursuant to the said Act. On the taxation of the bill of costs furnished by Robert Gilmore's solicitors, the solicitors for the Company objected to the items above mentioned, which were the costs of registering Robert Gilmore's title, being allowed. The Taxing Master allowed the objection, stating that if an apportionment were appreciable he would allow it, but as the amount was so small he did not allow anything in respect of it. Robert Gilmore then took out this summons.

Wylie, Q.C., for Robert Gilmore :—

Gilmore having purchased before the passing of the Local Registration of Title Act, 1891, had a good title without registration; see sections 22, 23, and 25 of that Act. The Company could have had the conveyance to them registered under the Act without having Gilmore's title registered, and I am informed that Monroe, J., so decided (1). But the Company, having required Gilmore's title to be registered, are bound to pay the costs of registering it. The costs are costs of conveyance, and are payable by the Company under sect. 82 of the Lands Clauses Consolidation Act, 1845. The fact that part only of the lands was taken by the Company makes no difference. The decisions show that all costs occasioned by the sale ought to be paid by the Company.

[He referred to *Ex parte Keatley* (2); *Ex parte Kelly* (3); *Re the Governors of Christ's Hospital* (4); *Re Liverpool Improvement Act* (5); *Re Bareham* (6).]

John Stanley, Q.C., for the Company :—

The Local Registration of Title Act, 1891, makes registration

(1) It has been ascertained that there is no such decision.—[Rep.].
(2) 25 L. R. Ir. 265.
(3) 31 L. R. Ir. 139.
(4) 12 W. R. 669.
(5) L. R. 5 Eq. 282.
(6) 17 Ch. Div. 329.

compulsory on purchasers under the Land Purchase Acts, and it was therefore necessary that Gilmore's title should have been registered, as well as the conveyance from him to the Company: see sections 22, 23 (1) (*a*), and 25 of the Act; and the Rules of December 21, 1891; Rules 26, 27, 28. Under sect. 22 (2), Gilmore could have registered his title free of expense before the 1st January, 1893, and he ought to have done so, or the Land Commission should, under sect. 23 (1) (*a*), have required him to register. Registration being necessary to complete Gilmore's title, he is bound to bear the costs of it: *Ex parte Phillips, In Re London and South-Western Railway Act* (1), referred to in Brown and Theobald on Railways, p. 206. These costs are not "costs of conveyance," or costs of "deducing title" under sect. 82. *Ex parte Kelly* (2) went further than the earlier cases, and was decided under sect. 80; the other cases cited are distinguishable.

THE MASTER OF THE ROLLS:—

The amount of the items in dispute is very small. The Taxing Master suggested that there might have been an apportionment of the items, but, in my opinion, this would not have been correct. I must take it as if there had been a conveyance of the whole of the lands vested in the vendor; there could not have been a broken registration of part of the lands, and no additional expense was incurred, although the registration enures to the whole of the estate. The lands in question were vested in Robert Gilmore, the vendor, by a vesting order of the Irish Land Commission, dated 25th October, 1890, made pursuant to the Land Purchase (Ireland) Acts. The Local Registration of Title Act, 1891, came into operation on the 1st January, 1892. The year within which, by the terms of section 22, sub-section 2, of that Act, Robert Gilmore could have been registered as owner, free of expense, expired on the 1st January, 1893, but he did not avail himself of this privilege. The question is, what is the meaning and effect of section 22? In terms registration of land purchased under the Land Purchase (Ireland) Acts is made compulsory. Sub-section 1 is as follows:—"From and after the commencement of

(1) 3 D. J. & S. 341. (2) 31 L. R. Ir. 139.

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this Act the registration of the ownership of freehold land shall be compulsory, where the land has been at any time sold and conveyed to, or vested in, a purchaser under any of the provisions of the Purchase of Land (Ireland) Acts, and is subject to any charge in respect of an annuity or rent-charge for the re-payment of an advance made under any of the said provisions on account of the purchase-money. In all other cases first registration under this Act shall be voluntary."

The vesting order in the present case is an order vesting land within the meaning of this sub-section, and the registration of the land thereby vested is compulsory, whatever that may mean. There is no limitation of time for registration provided by the Act, and registration is not a condition precedent to the validity of the vesting order; the Act contemplates that registration need not take place for a year at least after the commencement of the Act, or longer, because a premium is given for registering within the year. "Compulsory registration" must mean a personal obligation on the owner to some one or another to register. Section 23 provides that, in the event of the owner neglecting to register, the Land Commission may apply to have the land registered, and there may be some means of charging the owner with the expense of registration. Although registration is stated to be compulsory, it is not a condition precedent to the owner acquiring a good title by virtue of the vesting order. No penalty is imposed for non-registration, and no forfeiture; whether an indictment would lie for disobeying the Statute, I do not even surmise. But if the unregistered owner comes to deal with a purchaser, the provisions of section 25 come into operation. Sub-section 1 of this section is as follows:—"A person shall not, under any conveyance executed on or after the commencement of this Act, acquire any estate in any such land" (that is in land the registration of which is declared compulsory by section 22), "until he is registered as owner of the land, but on being so registered his title shall relate back to the date of the execution of the conveyance" (that is, the conveyance to him), "and any dealings with the registered land before the registration shall have effect accordingly." What these concluding words mean, I have not the remotest idea. But, contrast the earlier words of this sub-section with those of section 22, sub-

section 1, "the registration shall be compulsory"; but for anything therein provided it may be put off to the Greek kalends, and non-registration does not in any way deprive the vesting order of its operative effect. Sub-section 1 of section 25, on the other hand, declares expressly that a purchaser acquires no estate in the land till he is registered. Mr. Wylie stated that he believed Monroe, J., had decided that it was not necessary to register the title of the owner under sect. 22, in order to give a good title to a purchaser from such owner, provided that the conveyance to such purchaser was registered under section 25. If Monroe, J., so decided, I need hardly say I would follow his authority. It is not however necessary for me now to decide this point: the only question before me is, whether the Company should pay Robert Gilmore the sum of £2 2*s*., and the other two sums paid by him for registering his own title to the lands. Registration was not essential to his enjoyment of the lands, as he had a perfectly good holding title without it. The Company, however, called upon him to register, and he did so. Such registration was either necessary or unnecessary. If the decision attributed to Monroe, J., was made by him, it would be unnecessary. If it was necessary, it was only so for the purpose of conveying the lands to a purchaser; it was unnecessary so long as he or his devisees held the lands. The Company having required him to register cannot now say that it was unnecessary. If it was necessary, it was necessary for the purpose of conveying the title, which was undoubtedly in him, to the Company, who wanted the lands: not for the purpose of deducing title to the lands which the vesting order did. I am therefore of opinion that these items should be allowed.

Solicitors for the applicant: *Glover & M'Guckin.*
Solicitors for the Company: *Torrens, Son, & Bristow.*

W. L.

Monroe, J.
1895.
Feb. 6, 14.

M'KINLAY *v.* MACKEY.

Administration action—Further proceedings in aid of—Order as to carriage—Discretion of County Court Judge—County Court Orders, 1890, *Order XXXVI., Rule* 9.

A suit by equity civil bill was brought by the executors of A against her son B, for the administration of her personal estate. On the taking of the usual accounts and inquiries it appeared that certain farms held for chattel interests, of which A had been in possession, were the property of her deceased husband C, of whose estate A had obtained letters of administration, and the plaintiffs applied to the County Court Judge for liberty to file an equity civil bill for the administration of C's estate. Before the application was heard letters of administration *de bonis non* of C's estate were granted to B.

The County Court Judge made an order that B should have the carriage of the further suit :—

Held, on appeal—(1) that where, in the course of an administration suit, outside proceedings have to be brought, the County Court Judge has power to direct by whom such proceedings are to be taken ;

(2) That where there is a personal representative, whose conduct is unimpeached, of the testator whose estate is to be administered, he is *prima facie* the person to have carriage.

Order XXXVI., Rule 9 (County Court Orders, 1890), is not limited to a suit in existence at the time of making the order for carriage of proceedings, but extends to any proceedings which may have to be instituted in the course of an administration suit, and for its furtherance.

APPEAL by the plaintiffs, William M'Kinlay, and John M'Kinlay, executors of Sarah Mackey, deceased, from an order made by His Honor Judge Roche giving the carriage of a civil bill for the administration of the estate of Joseph Mackey, deceased, to the defendant, James Mackey. The circumstances are stated fully by Mr. Justice Monroe in giving judgment.

Charles Murphy, for the appellant :—

Order XXXVI., Rule 9, which will be relied on in support of the decision of the County Court Judge, does not apply to a new

proceeding which it may become necessary to take. It is confined to the existing suit. The original plaintiffs were the proper persons to have the carriage of the proceedings in relation to Joseph Mackey's estate, apart from actual misconduct on their part, which was not alleged: *Harrison* v. *Richards* (1); *Longbourne* v. *Fisher* (2); Walker and Elgood on Executors, p. 126.

F. Redmond, for the respondents:—

The County Court Judge had clearly a discretion in this case under Order XXXVI., Rule 9, the words of which are wide enough to include all proceedings in relation to the administration of an estate in the County Court. The powers of the County Court Judge, under section 33 of the Act of 1877, are the same as those of a Judge of the Chancery Division of the High Court of Justice, within the limits defined by the section. Those powers were defined in Ireland by section 151 of the Chancery (Ireland) Act of 1867, and in England by the Chancery Procedure Act of 1852, section 45. The two sections are identical, and in both the Judge is given the widest discretion as to the selection of the party who should have the carriage of an administration suit in his Court.

Moreover, when, in the exercise of his discretion, he selects one of two contending applicants, the Court of Appeal will not interfere: *Dowbiggin* v. *Trotter* (3). The cases relied on by appellants do not apply, as in them the proceedings arising out of the administration suits of which the respective parties had carriage, were proceedings to *realize* the assets pertaining to those estates, while here the object of the proceedings is to *charge* the assets in the hands of the executors with the unadministered portion of Joseph Mackey's estate, so that the parties now seeking to obtain carriage of the suit are really the accounting parties to the estate of Joseph Mackey.

On the merits the discretion has been rightly and properly exercised. The appellants have no claim whatever on personal grounds to the carriage of the suit: they are working men,

(1) L. R. 1 Ch. App. 473. (2) 47 Ch. Div. 479. (3) 20 W. R. 1024.

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living at Lisburn, nearly twenty miles from the property, and are not related in law, blood, or estate, to Joseph Mackey. Their sole claim is derived through Sarah Mackey, the person through whose default the complication arose. It cannot be stronger, therefore, than hers would have been before her death; but if the respondent and Sarah Mackey had issued concurrent Equity civil bills to administer Joseph Mackey's estate, carriage of the suit would have been given to the respondent: *Naylor* v. *Smith* (1); and the position of the appellants is even weaker than Sarah Mackey's would then have been, for she had the legal estate in Joseph Mackey's assets which they have lost, and that of the respondent is proportionately stronger, for he has acquired that estate. He is next-of-kin and legal personal representative of Joseph Mackey; he has the largest beneficial interest in the property, and he is a business man, residing on the spot, and carrying on the business. Neither in the law nor on the merits is there any ground for this appeal.

Feb. 14.

MONROE, J.:—

On the 29th January, 1894, an order was made by the Master of the Rolls for the administration of the assets of Sarah Mackey, and by consent the case was remitted for hearing before the County Court Judge of the county of Down. The suit was instituted by William M'Kinlay and John M'Kinlay, the executors of Sarah Mackey, against James Mackey, her son. Accounts were duly taken in the suit of all the personal estate, or what was supposed to be the personal estate, of the testatrix, and two small farms, with a bakery attached to one of them, were directed to be sold. When the title to the farms came to be investigated, it was found that one of them was held under a lease for years, made to Joseph Mackey, the husband of Sarah; the other under a tenancy from year to year; that he had died intestate in the year 1875; that Sarah and ten children continued to live on the farm after the death of Joseph; that Sarah gave portions to those of the children who had left the place; that two alone remained with

(1) 15 W. R. 528.

her at the time of her death, on the 31st January, 1893, James, the defendant, and Hugh; that she had made her will, giving the leasehold farm and bakery to James, and the other small farm and £50 to Hugh, and nominal sums to the other children who had been already provided for. James was made residuary legatee.

Under these circumstances the clerk of the peace found it impossible to make a proper final report, and referred the matter to the Judge. A notice of motion was instituted by the plaintiffs, grounded on an affidavit by Mr. M'Clelland, their solicitor, stating that directions were required as to the administration of Joseph's estate, and asking that the plaintiffs in this suit might be at liberty to file an equity civil bill for such administration. Before this motion came on for hearing, James had obtained administration *de bonis non* (1), to his father, Joseph, and he applied to the County Court that he should be at liberty as such administrator to have carriage of any proceedings to be taken for the administration of his father's estate. The County Court Judge made an order that James should be at liberty to institute such action. The present appeal is made by the plaintiffs against this order.

The contention on the part of the plaintiff is this. They say—We, as executors of Sarah Mackey, have carriage of a suit for the administration of her assets. Her assets are mainly composed of her share in the assets of her late husband. To ascertain what is Sarah's property, it is necessary to have her husband's estate administered, and the same persons ought to have carriage of both. In support of this argument, Mr. Murphy, for the plaintiffs, cited a number of cases. He referred to *Harrison* v. *Richards* (2). There a bill had been filed on behalf of five infants against an executor for the administration of the real and personal estate of the testatrix, to which the infants were beneficially entitled. In the course of the case it transpired that certain proceedings should be taken in reference to agreements made by the testatrix, which were considered impeachable. The plaintiffs in

(1) Sarah Mackey had taken out letters of administration to her husband.
(2) L. R. 1 Ch. App. 473.

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the administration suit sought to have the carriage of those, and the executor expressed a desire to carry on the proceedings himself. The Court of Appeal gave the carriage to the executor, expressing the rule of the Court to be that when there is no case of misconduct on the part of the executor, and he is willing to conduct the proceedings, it is most unusual to take the carriage from him. I do not see that this assists the plaintiffs' argument. The estate to be administered was Joseph Mackey's. The plaintiffs were not his executors. They were the executors of his widow, who had appropriated his estate, and the person to whom the County Court Judge gave the carriage was the administrator of the husband whose assets were to be administered. In *Longbourne* v. *Fisher* (1), in the course of an administration suit, an executor who had the carriage was obliged to take proceedings against his own father. Some of the persons beneficially entitled sought to have the carriage on the ground that the executor would not carry them on *bona fide*; the motion was refused, and the carriage was left with the executor.

Two other cases of *Dowbiggin* v. *Trotter* (2), and *Naylor* v. *Smith* (3), were also mentioned; but none of them throw any light on the present controversy. It seems to me quite clear that when, in the course of an administration suit before the County Court Judge, proceedings outside that suit have to be brought, the Judge has power to direct by whom these proceedings are to be taken; but he is to keep this principle in mind, that where there is an executor of the testator (whose property is to be administered) in existence and unimpeached, he is, *prima facie*, the person to bring them.

Order XXXVI., Rule 9, of the County Court Orders, 1890, is quite clear—"The Judge may order what party shall have the conduct of any suit or matter." I cannot limit this to a suit or matter in existence. It applies to any matter or suit which may have to be directed in the course of an administration, and for its furtherance.

If, then, the County Court Judge had a discretion to exercise in this case, has it been properly exercised? In my opinion he

(1) 47 Ch. Div. 479. (2) 20 W. R. 1024. (3) 15 W. R. 528.

could not reasonably have exercised his discretion differently from what he did. The plaintiffs in this suit were the executors of Sarah Mackey. Sarah Mackey took possession of her husband's assets twenty years ago. She appears to have had no assets of her own, save the one-third to which she became entitled on her husband's death. James Mackey has now taken out administration to his father, and the mother's executors must show what has become of the assets of which James is now the legal owner. The executors of Sarah seek to have carriage of proceedings as plaintiffs in a suit to be instituted in order to make themselves accountable. But further, the County Court Judge had the following facts before him in the affidavits which have been filed. The executors of Sarah appear to be entirely illiterate. They sign their affidavits as marksmen. They are labouring men, working on a bleach-green in Lisburn, many miles from the place where this small farm and bakery of Joseph Mackey were situated, and declaring themselves entirely ignorant of accounts. James Mackey, the administrator, is on the spot, knows the business, is acquainted with everything connected with the trading which he helped to carry on under his mother's direction.

I say nothing as to whether means could not be found to dispense with a further suit altogether. All the accounts have been already taken in this suit as if the whole property belonged to Sarah Mackey. It is not at all likely there are any outstanding debts of Joseph; and any surplus, after payment of debts, would belong to the two brothers. Joseph appears to have had only sufficient to pay his outstanding liabilities. To determine now how much of this small property forms part of the assets of Joseph, and how much forms part of the assets of Sarah, may lead to interesting questions of fact and law. The clerk of the peace may be driven to make an inquiry as to how many of the cows and pigs now in existence are the lineal descendants of those that belonged to Joseph, or how many were purchased with the proceeds of their sale; and when these inquiries are completed, they may only determine how much of the residue, if there be one, is derived by the brothers from their father and their mother respectively. I greatly fear that if the

Monroe, J. 1895. M'KINLAY v. MACKEY.

litigation be persisted in, before all is ended both oysters and shells will have disappeared. This is a matter for the parties themselves.

My duty ends with affirming the judgment of the County Court Judge, and dismissing the appeal with costs.

Solicitor for the plaintiffs: *A. M'Clelland.*
Solicitors for the defendant: *Fryar & M'Spadden.*

W. G.

H. L. 1895. May 13.

M'ENTIRE AND OTHERS, APPELLANTS; CROSSLEY, BROTHERS, LIMITED, RESPONDENTS.

Hiring agreement—Construction—Property in goods—Bill of sale.

APPEAL by the assignees in bankruptcy of Thomas Frederick Peel, a bankrupt, from the decision of the Court of Appeal in Ireland—[1894] 1 Ir. R. 240.

Moulton, Q.C., and *Muir Mackenzie* (both of the English Bar) (*Robert Doyle*, with them), for the appellants.

Sir R. Webster, Q.C., and *C. A. Russell* (of the English Bar), for the respondents.

THE HOUSE OF LORDS (Lord Herschell, L.C., and Lords Ashbourne, Watson, and Shand) affirmed the decision of the Court of Appeal, and held that the property in the gas-engines did not pass to the bankrupt (1).

Solicitors for the appellants: *Hasties*, for *J. Rose Byrne.*
Solicitors for the respondents: *Grundy, Kershaw, Saxon, Samson, & Co.*

(1) Weekly Notes, 1895, p. 84

MAHONY *v.* MAHONY.

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Feb. 11, 18, 25.

Appeal.
March 4.

Practice—Adultery—Particulars—Sufficiency—Order in Chambers—Motion to discharge—Appeal—Adjournment into Court—Counsel—Order LIV., Rule 16.

In his answer to a petition brought by his wife for restitution of conjugal rights the respondent alleged that she had committed adultery. The charges against her, as specified in the respondent's answer, particulars, and affidavit were substantially as follows:—

Paragraph 3. The respondent says that the petitioner, on the 4th August, 1890, and frequently in the year 1890, and on the 31st January, 1891, and frequently during the year 1891, and during the year 1892, and in particular on the 21st and 26th November, 1892, and up to June, 1893, visited C. at his office (naming it), and on divers of such occasions, which occurred sometimes two or three times a-week, including the 4th August, 1890, and 31st January, 1891, committed adultery with him. The respondent is unable to furnish more exact particulars of the dates.

Paragraph 4. Between the middle and end of July, 1892, the petitioner, at the S. hotel, Dublin, and in July or August (as I believe, on the 22nd July), 1892, at L.'s hotel, Cork, committed adultery with H. S.

Paragraph 5. On the 21st November, 1892, the petitioner, at L.'s hotel, Cork, committed adultery with C.:—

Held, that the petitioner was not entitled to require further particulars as regards the charges contained in paragraphs 3, 4, or 5 of the answer.

The petitioner issued a summons for further particulars. The application was refused. The petitioner then moved to set aside the order made in Chambers, or, in the alternative, for leave to appeal:—

Held, that the petitioner, being desirous of appealing against the order made in Chambers, ought to have adopted the course of applying that the case should be adjourned from Chambers into Court, which application would have been granted as a matter of course.

SUMMONS FOR PARTICULARS.

By her petition filed the 14th November, 1894, the petitioner sought to obtain a decree for restitution of conjugal rights. By his answer filed 14th December, 1894, the respondent alleged just cause for refusing to live with the petitioner, and relied on a deed of separation whereby he alleged it was agreed between him and the petitioner to live separate, and alleged that the petitioner

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was barred thereby from suing for restitution of conjugal rights. In the alternative the respondent alleged that petitioner had been guilty of adultery with persons named, and that she had been guilty of cruelty by reason of her being given to intemperance, and having assaulted respondent and disobeyed his directions and commands, and on these grounds claimed a divorce *a mensa et thoro* from the petitioner.

In the 3rd paragraph of his answer respondent alleged "that the petitioner, on the 4th August, 1890, and frequently in the year 1890, and on the 31st January, 1891, and frequently during the year 1891, and during the year 1892, and up till June, 1893, visited C. at his office (naming it), and on divers of such occasions (including the said 4th August, 1890, and 31st January, 1891) committed adultery with the said C. The respondent is unable to furnish more exact particulars of the dates of the said occasions."

The 4th and 5th paragraphs were as follows:—

(4). "That in the month of July, 1892, the petitioner, at the Shelbourne Hotel, Dublin, and in July or August, 1892, at Leech's Hotel, Cork, committed adultery with H. S."

(5). "That on the 21st day of November, 1892, the petitioner, at Leech's Hotel, in the city of Cork committed adultery with the said C."

The answer was verified by the affidavit of the respondent.

The petitioner in her reply denied the charges of adultery.

On the 12th January, 1895, the petitioner served a notice demanding particulars of the adultery alleged in the 3rd and 4th paragraphs of the answer.

On the 23rd January the respondent served a notice with particulars; and as to the 3rd paragraph the notice gave two additional dates as to the alleged adultery, viz.: the 21st and 26th November, 1892; and as to the 4th paragraph alleged the adultery at the Shelbourne Hotel took place between the middle and end of July, 1892, and stated that the respondent was not able to give further particulars.

On the 26th January, the petitioner asked for further particulars, as to paragraphs 3 and 4 to which, on the 1st February, the respondent replied as follows:—"That the visits referred to in paragraph 3 of his said answer took place frequently through-

out the said years in the said particulars mentioned, as often as two or three times in some weeks during the said years; but the respondent is unable to give further particulars of the dates, or occasions thereof, than are contained in his said answer and the particulars thereof already furnished to the petitioner and in the further statement of the respondent. The respondent is unable to give further particulars of the dates or occasions mentioned in the said paragraph 3 of his said answer, on which the petitioner is alleged to have committed adultery with the said C. The respondent is unable to furnish better particulars than those already afforded respecting the other occasions referred to in your said notice, namely, the alleged acts of adultery committed at the Shelbourne Hotel, Dublin, and Leech's Hotel, Cork, inasmuch as the respondent has been refused and has been unable to obtain access to the hotel books, and has not been able otherwise to obtain information to enable him to give further particulars of the said dates and occasions."

On the 2nd February a summons was issued and an affidavit filed by the petitioner as to the necessity of further information. The summons asked "that the respondent do give further and better particulars of the adultery alleged to have been committed by the petitioner than have been given in the respondent's answer, and the notices of particulars, dated respectively the 23rd day of January, 1895, and the 1st day of February, 1895, or in the alternative for an order that the respondent be restricted at the trial to proof of the occasions of which the dates are specifically given in the said answer and notices and particulars on which the petitioner is alleged to have committed adultery."

On the 9th February the respondent filed an affidavit in which he stated: "I positively swear that I am wholly unable to furnish the petitioner with further or better particulars of the adultery in my answer filed in this cause alleged to have been committed by the petitioner than are contained in my said answer, and in notices served on my part, dated 23rd day of January and 1st day of February respectively. The visits referred to in paragraph 3 of my said answer, paid by the petitioner to the said C., at his office (naming it) occurred, as I am informed and believe, frequently during the years mentioned in the said paragraph, sometimes two

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or three times in a week, but I am wholly unable to give further particulars of the dates and occasions of the adultery alleged against the petitioner in the said paragraph than I have already furnished to the petitioner. With respect to the occasions referred to in paragraph 4 of my said answer I had given all the particulars within my knowledge, but from information I have since received I believe it (*sic.*) took place on or about 22nd July, 1892.

"I am wholly unable to give further particulars respecting alleged adultery at Leech's hotel, Cork, than what I have already given, as my informant cannot fix the date other than that given in my answer.

"I further positively swear that I do not possess and have not been able to procure further information than I have already afforded to the petitioner respecting the said occasion referred to in the said paragraph of my answer."

The Right Hon. John Atkinson, Q.C., O'Shaughnessy, Q.C., and *G. Y. Dixon*, in support of the application.

Wright, Q.C., and *Redmond Barry*, for the respondent.

The following authorities were referred to:—*Keenan* v. *Pringle* (1); *Spedding* v. *Fitzpatrick* (2); *Zierenberg* v. *Labouchere* (3); *Kelly* v. *Kelly* (4); *Coates* v. *Croyle* (5); *Thomson* v. *Birkley* (6); *Knight* v. *Engle* (7); *Higgs* v. *Higgs* (8); *Lidstone* v. *Lidstone* (9); *Marshall* v. *Inter-Oceanic, &c., Company* (10).

Feb. 11.

THE COURT made "no rule" on the application.

On 18th February, 1895, the petitioner moved that the order made in Chambers on 11th February making "no rule" on the petitioner's application for particulars of the alleged adultery might be set aside or discharged, and that instead thereof it might be declared that the respondent should give further and better particulars of the adultery alleged to have been committed than have been given in the respondent's answer, notices of particulars and affidavit, or that the respondent be restricted at the trial to proof

(1) 28 L. R. Ir. 135.
(2) 38 Ch. Div. 410.
(3) [1893] 2 Q. B. 183.
(4) 23 L. R. Ir. 136.
(5) 4 *Times'* Rep. 735.
(6) 47 L. T. 700.
(7) 61 L. T. 780.
(8) 32 L. J., P. & M. (N. S.) 64.
(9) *Ibid.* 66, note.
(10) 1 *Times'* Rep. 394.

of the occasions of which the dates were specifically given, or in the alternative that the petitioner might be at liberty to appeal from the order of the 11th February to the Court of Appeal.

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Dixon, for the petitioner :—

An application on summons in the Probate and Matrimonial Division is an application in Chambers : *Rooney* v. *Langtry* (1).

The order refusing further particulars having been made in Chambers cannot be appealed from unless by leave of the Court until a motion is made to set it aside : Judicature Act, 1877, s. 54. The proper course in the Chancery Division is to ask the Divisional Court for liberty to appeal, or in the alternative, that the order made on summons in Chambers be discharged : *Thomas* v. *Elsom* (2) ; *Holloway* v. *Cheston* (3). The same practice will be followed in the Probate Division : *Rigg* v. *Hughes* (4).

Order LIV., Rule 19, provides that this application being by way of appeal from a decision at Chambers should be by motion.

Redmond Barry, for the respondent :—

The order made in Chambers refusing the application is right, and should not be discharged. The present motion is untenable, and ought to be refused with costs.

THE PRESIDENT :—

Feb. 25.

In this suit the petitioner issued a summons for particulars. I think the petitioner ought to have applied that the case should be adjourned from Chambers into Court : this would have been done as of course, and if done the present motion would not have been made. Three counsel appeared for each party. I rather think I ought to have heard only one counsel (Order LIV., Rule 16). However, I did hear two counsel on each side, and then I refused the application.

The petitioner has now moved to set aside the order made in Chambers, or, in the alternative, for leave to appeal. I think it is more convenient to make an order on the first alternative, and give a considered judgment in the case ; and then the parties may, without any leave, appeal from this order as they may be advised. The present motion is a rehearing in Court of the summons heard

(1) 31 L. R. Ir. 175.
(2) 6 Ch. Div. 346.
(3) 19 Ch. Div. 516.
(4) 9 P. D. 68.

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in Chambers: *Boake* v. *Stevenson* (1). The petitioner sues her husband for the restitution of conjugal rights. The respondent by his answer sets up three defences, viz. a separation deed, adultery, and cruelty. For the purposes of this motion I may confine my observations to the charge of adultery upon which the respondent founds a claim for a divorce *a mensa et thoro*, so that the answer is really a cross-petition or counterclaim. The charge of adultery is contained in the 3rd, 4th, and 5th paragraphs of the answer. The 8th paragraph of the answer is as follows:—"Petitioner on many occasions during the years 1892 and 1893 was absent from her house until late hours of night without any proper cause or reason therefor, and without the permission of the respondent; and on three occasions, namely, November 21st, 1892, May 25th, and June 2nd, 1893, the petitioner remained out during the whole night, and did not return home until the following day. Towards the end of the year 1892 when the respondent was removing from Cork to Blarney the petitioner refused to stay with the respondent at his mother's house where he was temporarily residing during his said removal, and remained one night altogether away from him and his children. In the month of December in the same year also the petitioner without any reason for her so doing left respondent's house and went to Dublin where she remained for a considerable period. The respondent admits, however, that the petitioner whilst in Dublin resided with her father." This answer was verified by the affidavit of the respondent.

The petitioner, in her reply, denied the charges of adultery, and avers that she was never absent from the respondent's house without proper cause and reasons, of the existence and nature of which the respondent was well aware. The petitioner does not deny the alleged fact of absence from the husband's house.

To this reply the respondent filed a rejoinder chiefly relating to the separation deed.

On the 12th January the petitioner served a notice demanding within forty-eight hours particulars of the adultery alleged in the 3rd and 4th paragraphs of the answer, and also particulars of the alleged acts of cruelty, and particulars of the 8th paragraph which

(1) W. N. 1894, p. 217.

I have read. I observe this notice does not require particulars of the 5th paragraph; and reading that paragraph which alleges that the petitioner committed adultery on a given day, at a given place, with a given person, and the fact that the objection was given up by counsel on the hearing of the summons, I confess it seems to require some—shall I say courage—now to rehear the summons as regards that paragraph.

On the 23rd January the respondent served a notice with particulars, and that notice has been accepted without objection as regards the charges of cruelty, and the statements in the 8th paragraph. As to the 3rd paragraph the notice fixed two additional dates, 21st and 26th November, 1892, for adultery; and as to the 4th paragraph said the adultery at the Shelbourne Hotel took place between the middle and end of July, 1892, and stated that the respondent was not able to give further particulars.

On the 26th January the petitioner asked for further particulars as to paragraphs 3 and 4, to which respondent replied on the 1st February as follows:—

"That the visits referred to in paragraph 3 of his said answer took place frequently throughout the said years in the said particulars mentioned as often as two or three times in some weeks during the said years; but the respondent is unable to give further particulars of the dates or occasions thereof than are contained in his said answer and the particulars thereof already furnished to the petitioner, and in the further statement of the respondent. The respondent is unable to give further particulars of the dates or occasions mentioned in the said paragraph 3 of his said answer on which the petitioner is alleged to have committed adultery with the said C. The respondent is unable to furnish better particulars than those already afforded respecting the other occasions referred to in your said notice, namely, the alleged acts of adultery committed at the Shelbourne Hotel, Dublin, and Leech's Hotel, Cork, inasmuch as the respondent has been refused and has been unable to obtain access to the hotel books, and has not been able otherwise to obtain information to enable him to give further particulars of the said dates and occasions."

On the 2nd February a summons was issued and an affidavit filed by the petitioners as to the necessity for further information.

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The summons asked "That the respondent do give further and better particulars of the adultery, alleged to have been committed by the petitioner, than have been given in the respondent's answer, and the notices of particulars, dated respectively the 23rd day of January, 1895, and the 1st day of February, 1895, or, in the alternative, for an order that the respondent be restricted at the trial to proof of the occasions of which the dates are specifically given in the said answer and notices and particulars on which the petitioner is alleged to have committed adultery."

On the 9th, the respondent filed an affidavit in which he stated "I positively swear that I am wholly unable to furnish the petitioner with further or better particulars of the adultery, in my answer filed in this cause alleged to have been committed by the petitioner, than are contained in my said answer and in notices served on my part, dated 23rd day of January, and 1st day of February, respectively.

"The visits, referred to in paragraph 3 of my said answer, paid by the petitioner to the said C. at his office, Cork, occurred, as I am informed and believe, frequently during the year mentioned in the said paragraph; sometimes twice or three times in a week, but I am wholly unable to give further particulars of the dates and occasions of the adultery alleged against the petitioner in the said paragraph than I have already furnished to the petitioner.

"With respect to the occasions referred to in paragraph 4 of my said answer, I had given all the particulars within my knowledge, but, from information I since received, I believe it took place on or about 22nd July, 1892.

"I am wholly unable to give further particulars respecting alleged adultery at Leech's Hotel, Cork, than what I have already given, as my informant cannot fix the date other than that given in my answer.

"I further positively swear that I do not possess and have not been able to procure further information than I have already afforded to the petitioner respecting the said occasion referred to in the said paragraph of my answer."

Upon these documents the summons was heard. It was not further argued at either side upon the re-hearing which I have now to dispose of.

Motions for particulars are important in connection with fair trials and the administration of justice, and full powers are given to and exercised by all divisions of the High Court of Justice, including the division over which I preside. The Court does all it can to prevent an unfair surprise upon any person charged with misconduct. As far as possible in the case, for example, of alleged sexual misconduct, to fix the name of the alleged co-culprit, the place and date of the offence, but there have been cases in which the complainants could not give these; sometimes the name, sometimes the exact place, sometimes the exact date cannot be given, and the action has not been stopped, and sometimes, for obvious and settled reasons, important particulars, such for example as the names of intended witnesses, etc., will not be given.

This Court is more favourable to a grant of information in one respect, I believe, than a Common Law Court. Particulars must be given in the pleading, and the Court will interfere and strike out of the pleading general charges, and require the pleading itself to be amended. *Pyne* v. *Pyne* (1), *Porter* v. *Porter* (2) are illustrations. Again I take it that if the party, in the opinion of the Court, gives the best particulars he can supply, the Court will not stop the case or shut out the evidence at the trial. In *Higgs* v. *Higgs* (3), to which Mr. Wright referred, a petition for dissolution alleged that on divers occasions since the 1st of January, 1862, the respondent had "accompanied Henry Hopkins to divers places in Bristol and its neighbourhood unknown to the petitioner, and has committed adultery with the said Henry Hopkins." There no place was mentioned, no date was given, only the name of the co-respondent was disclosed, and the Court ordered that particulars of the charge should be given, or that the petitioner should file an affidavit that he was unable to do so.

In the case before the Court the respondent has made such an affidavit, and I believe it. His explanation about the Shelbourne Hotel is satisfactory, and the discovery of some further information since the answer was filed leads me to the conclusion that he and his solicitors have *bonâ fide* exerted themselves to obtain the information demanded by the petitioner, and that the failure to

(1) 1 Sw. & Tr. 80. (2) 33 L. J., P. & M. (N. S.) 207.
(3) 32 L. J., P. & M. (N. S.) 64.

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ascertain the dates is not his fault. Having regard to the cases I have cited, to the power of the Judge if necessary to adjourn the trial, as in *Codrington* v. *Codrington* (1) in case of surprise, and to his duty to caution the jury as to the necessity of weighing strictly evidence which a party has not had reasonable opportunity of controverting or explaining, I should be prepared upon this ground alone to refuse the present motion.

But I rest my order on the practice of the English Divorce Court, as established by reported cases, as to where particulars will be ordered and where refused.

Lidstone v. *Lidstone and Edmonds* (2), which I mentioned on the hearing of the original summons, was a suit for dissolution of marriage. The marriage took place in 1850, and the suit was commenced eleven or twelve years afterwards. The petition alleged that on divers occasions since the date of the marriage, the said Selina Lidstone, had committed adultery. That was the third paragraph. The fourth paragraph of the petition was as follows:—"That in the month of May, 1862, the said S. Lidstone, having formed an adulterous connection with the said R. G. Edmonds, left my house, and has ever since habitually committed adultery with the said R. G. Edmonds, at some place in Wales, at present unknown to me, during the months of July and August, also at a house situated at Victoria-place, Stoke, in the borough of Devonport, in the county of Devon, during the months of October and November, 1862, and at divers other places at present unknown to me." The allegation in the third paragraph, that during twelve years on divers occasions the respondent had committed adultery, was of course too general and indefinite, and particulars were ordered to be given; but as regards the fourth paragraph, where no specific date was given, where no specific house was alleged except a house in Victoria-place, Stoke, and where it was alleged that adultery had been committed at divers other places, the Court refused to grant particulars.

In *Boddy* v. *Boddy* (3) the petition for dissolution alleged a specific act of adultery on the 25th August, and then further alleged that acts of adultery had been committed between the 25th

(1) 4 Sw. & Tr. 63. (2) 32 L. J., P. & M. (N. S.) 66, note.
(3) 28 L. J., P. & M. (N. S.), 16.

August and the 31st October, that is during a period of three months, without giving any further particulars; and the Judge refused to order further particulars to be furnished; and in *Graves* v. *Graves* (1), which is an old case, it is laid down that, where the opportunities for intercourse have been of rare occurrence, it is reasonable to require particular dates and times to be furnished, but where there have been frequent opportunities for intercourse, the particular dates and times need not be alleged.

In *Porter* v. *Porter* (2) the petition (in the third paragraph) alleged that "since the 8th October, 1846," that is during a period of eighteen years, the respondent had "on divers occasions committed adultery." And the fourth paragraph was as follows:—"That the respondent had, since April, 1864, up to the date of the petition, been habitually visited at her residence, by B. J. and had on divers of such occasions and particularly on the night of the 31st August, 1864, committed adultery with him." It was held that it was not sufficient to give particulars of the dates and places of the adultery alleged in the third paragraph and the persons with whom it was committed, but that the petition should be amended by giving such particulars; but that the respondent was not entitled to particulars of the adultery charged in the fourth paragraph. The allegation there was, "habitually visited" by the co-respondent, just as here it is alleged conversely that the alleged culprit was frequently—sometimes two or three times a week, *i. e.* habitually—visited by the petitioner.

I read the charges in this case as they now stand on answer, particulars, and affidavit.

Paragraph 3. The respondent says, that the petitioner on the 4th August, 1890, and frequently in the year 1890, and on the 31st January, 1891, and frequently during the year 1891, and during the year 1892, *and in particular, on the 21st and 26th November*, 1892, and up to June, 1893, visited C., at his office, Cork, and on divers of such occasions which occurred sometimes two or three times a week including the 4th August, 1890, and 31st January, 1891, committed adultery with the said C. The respondent is unable to furnish more exact particulars of the dates.

(1) 3 Curt. 235, 241. (2) 33 L. J., P. & M. (N. S.) 207.

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Paragraph 4. That *between the middle and end of* July, 1892, the petitioner, at the Shelbourne Hotel, Dublin, and in July or August, *as I believe on the 22nd of July*, 1892, at Leech's Hotel, Cork, committed adultery with H. S.

Paragraph 5. That on the 21st November, 1892, the petitioner, at Leech's Hotel, Cork, committed adultery with said C.

In my opinion, comparing these particulars with the cases to which I have referred, the order made in Chambers follows these authorities and is right. I regret that the petitioner did not take the opportunity of pointing out any distinction between these cases and these principles and the present case when this motion was made.

In my opinion the petitioner is not entitled to require further particulars as regards the charges in paragraphs 3, 4, or 5 of the answer. And accordingly, the Court affirms the order of the 11th February, 1895, made in Chambers, and refuses the motion to set same aside, with £3 3*s.* costs, to be paid by petitioner, or set off *pro tanto* against any costs ordered to be paid to her by the respondent.

R. W. L.

Appeal. 1895. March 4.

The petitioner appealed to the Court of Appeal (1).

The Right Hon. John Atkinson, Q.C., and *G. Y. Dixon*, for the appellant:—

The words "divers of such occasions including" should be omitted in paragraph 3 of the answer, or else the dates and particulars of such occasions approximately specified.

The reported cases in which particulars of alleged adultery have been applied for fall into two categories—1, those in which the misconduct charged was alleged to have been an adulterous intercourse, almost if not quite amounting to cohabitation; and, 2, those in which the misconduct charged consists of occasional acts of adultery. In cases belonging to the first class the Court has been slow to order particulars, while in cases coming within the second class the rule is that particulars must be given.

(1) Before FITZGIBBON and BARRY, L.JJ.

Graves v. *Graves* (1), *Lidstone* v. *Lidstone and Edmonds* (2), and *Higgs* v. *Higgs* (3) were all cases where an habitual adulterous intercourse was alleged; in the last case, indeed, not quite so plainly as in the other two, and for that reason the person making the charge was directed to file an affidavit that the particulars of the misconduct were unknown to him so that the person charged might have no doubt of the nature of the charge she had to meet. The affidavit filed by the respondent in this case makes the matters no more specific, and does not allege habitual misconduct as the reason why the particulars cannot be given.

The misconduct alleged in the 3rd paragraph of the respondent's answer is not habitual adulterous intercourse. There is no allegation that the visits were made without the respondent's knowledge, as was alleged in *Foster* v. *Thomas* (4). There is nothing alleged in the answer to show that the mere "visiting" apart from the adultery was improper. The letters referred to in the petition show that when the petitioner demanded restitution of conjugal rights the respondent made no charge of misconduct against her. The answer shows that the petitioner and respondent cohabited down to November 29th, 1892, a date later than any of the alleged acts of adultery of which particulars are given. The respondent, by the deed mentioned in his answer, stipulates that he is to have the custody of a child, which (as appears by the deed) was born in December, 1891. It is not possible that the conduct charged in paragraph 3 of the same pleading can be intended to be a charge of adulterous intercourse commencing in 1890, and continued for upwards of three years.

The case, therefore, belongs to the second class above mentioned, and in such cases the Court compels particulars to be given when the occasional acts are alleged during a long period. In *Codrington* v. *Codrington* (5) the alleged acts extended over a period of three years, and particulars were ordered. *Wells* v. *Wells* (6) shows that where occasional acts are charged over a period of one year particulars must be given. *Boddy* v. *Boddy* (7)

(1) 3 Curt. 235.
(2) 32 L. J., P. & M. (N. S.) 66, note.
(3) *Ibid.* 64.
(4) *Ibid.* 64, note.
(5) 33 L. J., P. & M. (N. S.) 53.
(6) 32 L. J., P. & M. (N. S.) 65, note.
(7) 28 L. J., P. & M. (N. S.) 16.

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and *Porter* v. *Porter* (1) are relied on by the President of the Probate and Matrimonial Division, but in the former case the alleged acts were charged during a period of two months and six days, and in the latter case the adultery was charged to have commenced in April, and the motion on which the case is reported was made in November of the same year. The periods covered by the charges in those two cases bear no resemblance to the period left unspecified here.

Further, the current of authority is now in favour of preventing surprise at the trial. Courts are more inclined to direct particulars than they were thirty years ago: *Keenan* v. *Pringle* (2); *Spedding* v. *Fitzpatrick* (3); *Zierenberg* v. *Labouchere* (4).

Wright, *Q.C.*, and *Linehan*, for the respondent, were not called on.

FITZ GIBBON, L. J.:—

In the 3rd paragraph of the answer the respondent says:—"The petitioner on the 4th August, 1890, and frequently in the year 1890, and on 31st January, 1891, and frequently during the year 1891, and during the year 1892, and up to June, 1893, visited C. at his office" (giving the name and address), "and on divers of such occasions, including the said 4th August, 1890, and 31st January, 1891, committed adultery with him. The respondent is unable to furnish more exact particulars of the dates of the said occasions."

Reading that paragraph, it would appear to me that it meant that on two particular occasions actual evidence of misconduct was to be given, and that the frequency of the visits to the place, and to the person, named would be relied on as evidence from which similar misconduct was to be inferred on other occasions.

On January 12th, 1895, the petitioner demanded further particulars as to the dates of the alleged adultery; and on January 23rd, 1895, the respondent's solicitors replied as follows:—"In

(1) 33 L. J., P. & M. (N. S.) 207.
(2) 28 L. R. Ir. 135.
(3) 38 Ch. Div. 410.
(4) [1893] 2 Q. B. 183.

addition to the dates specified in paragraph 3 of the respondent's answer dated December 13th, 1894, the respondent says that two of the occasions referred to therein were the 21st November, 1892, and 26th November, 1892. The respondent is unable to give further particulars of the other occasions referred to than are contained in the said paragraph."

That brings the matter to this: in the year 1890 one date and frequent visits; in the year 1891 one date and frequent visits; in the year 1892 two dates and frequent visits; and in 1893, up to June, frequent visits, and that alone.

A further notice was served by the petitioner's solicitor, calling for additional particulars; and in reply an affidavit was made by the respondent, in which he says, "I positively swear I am unable to give better or further particulars of the dates and occasions of the acts of adultery alleged."

Another notice was then served, and in answer to it, on February 1, 1895, the respondent's solicitors served the following notice:—"The respondent says that the visits referred to in paragraph 3 of his said answer took place frequently throughout the said years in the said paragraph mentioned, as often as two or three times in some weeks during the said years; but the respondent is unable to give further particulars of the dates or occasions thereof than are contained in his said answer and the particulars thereof already furnished to the petitioner, and in the further statement of the respondent."

The petitioner having served notice that an application would be made to the Court to compel the respondent to give further particulars, he, on the 9th February, 1895, made an affidavit in which he says:—"I positively swear I am wholly unable to furnish the petitioner with further or better particulars of the adultery in my answer filed in this cause, alleged to have been committed by the petitioner, than are contained in my said answer, and in the notices served on my part, dated the 23rd January, and 1st February, 1895, respectively. The visits referred to in paragraph 3 of my said answer, paid by the petitioner to the said C., at his office, occurred, as I am informed and believe, frequently during the years mentioned in the said paragraph, sometimes twice or three times in a-week, but I am wholly unable

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to give further particulars of the dates and occasions of the adultery alleged against the petitioner in the said paragraph than I have already furnished to the petitioner."

I have read the pleading, notices, and affidavits, for the purpose of showing how this case stands, with regard to the two categories of cases on which we have authorities. In the one, specific acts, more or less occasional, are the subject-matter of the allegation; but in the other, the impugning party alleges such a continuous course of conduct, such frequenting of a particular place, or such association with a particular person, as raises the the inference of misconduct. The most familiar case of the second class is where a man and woman run away, and stay for a fixed time together at a hotel or other place, under such circumstances as to infer that they are living together as man and wife; in such a case it would be impossible to give particulars of the dates of acts of adultery, and it would be absurd to require them.

The present case is intermediate; there is no general allegation that the parties have been living together; on the other hand, more is alleged than specific or occasional acts of intercourse. It appears to me that the Judge of the Court of Probate has taken the correct course as between the two classes of cases. He says that he is satisfied that the respondent has given all the particulars he is able to give of specific dates and occasions, and that, having done that, he is not to be shut out from the general allegation that there was besides such a course of conduct, consisting of interviews meetings and intercourse generally, between his wife and the person charged, as justifies him in relying upon that conduct as evidence that adultery was committed on some other occasions, which he is unable to specify.

We were pressed by Mr. Atkinson with the argument that, unless the respondent was ordered to give further particulars, a great and unreasonable burden would be cast upon the petitioner, in having to explain and account for her conduct during the entire period of time covered by the allegations; but I do not see that any greater burden is imposed upon her than if additional particulars were given, because, if evidence is given of a long and continuous course of conduct, and of frequent meetings

and interviews at the place named, it will be essential for the petitioner to meet that by proving the real character of those interviews during the entire time; not merely to deal with specific occasions, but generally to explain her conduct during the entire period.

I have only one word to say as to the objection on the ground of possible surprise. It has been already answered by the Judge of the Court of Probate. If evidence is given of specific acts, on dates not mentioned by the respondent in his answer or in his notices, and if there is the slightest reason to believe that the petitioner has thereby been taken by surprise, or that she would be able to meet that evidence if time were given her, the proper course will be to adjourn the trial. There is a much greater probability of a miscarriage of justice if the respondent is shut out from making a case which he is entitled to make, than there is of prejudice to the petitioner by surprise; and in the one case the injury can be remedied by an adjournment of the trial, whereas in the other case it would be irreparable, for if the respondent were shut out from giving such evidence, he would be shut out for ever.

For these reasons, we are of opinion that the judgment of the Court below, both in reason and in law, was correct, and ought to be affirmed.

BARRY, L. J.:—

I concur. I think it is quite a mistake to attempt to lay down a hard and fast line or rule whereby you can determine at once, in any given case, whether particulars, or further particulars, or no particulars, ought to be given. Every case must depend upon its own facts. Lord Justice FitzGibbon has pointed out the distinction between the two classes of case: one, in which specific acts are charged in the pleadings, and relied upon; the other, where there is a course of general conduct alleged, leading, if proved, to the inference that adultery has been committed. In the first class of case, that of specific acts, particulars ought to be given, within due limits. I mentioned, during the argument, a case in which the party ought to have succeeded, but failed, by reason of a mistaken date being given in the particulars. There-

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fore I say that, even in such a case, there should be some reasonable limit in requiring particulars. On the other hand, in the second class of case, it would amount to a perfect denial of justice to shut out a party from giving evidence that would lead any rational mind to the conviction that misconduct had taken place, by requiring him to give particulars which it would be impossible, from the nature of the case, that he could give. Where evidence is given of a course of conduct, extending over a considerable time, and no satisfactory explanation is given of it, as, for instance, where a lady is proved to have visited a man's office, chambers, or lodgings, day after day, and no satisfactory explanation is given of those visits, it is certainly a very strong piece of evidence. It would be most unreasonable in such a case to require the party to give particulars. Suppose witnesses are produced, who, perhaps, are strangers to the parties, and perfectly disinterested about the matter, not caring a farthing about it one way or the other, and they come forward and say, "We saw this lady go two or three times a week into the office of this gentleman," it would be most absurd and unreasonable to expect them to name some particular day. Suppose I am in the habit of seeing a remarkable horse pass in the street, opposite my house, very often, I may be able to say that I saw that horse, of a particular colour, pass up and down the street two or three times a week, but if I were asked to name any particular day on which I saw him, I could not do it. I can perfectly understand that the respondent is telling the truth when he says, "I can prove that the petitioner paid frequent visits to the office of this gentleman during those years, but I cannot give you better information as to days and dates."

Then there is a matter which I think ought not to be put out of mind. That is, that the Judge of the Probate and Matrimonial Division, who has refused to order these particulars, is the Judge who will try the case. He suggested himself that the difficulty arising from want of particulars, can, if the petitioner is taken by surprise, be got over by an adjournment of the trial. He appears to be perfectly conscious of the nature of the difficulty that may arise in respect of particulars; and therefore we may be reasonably sure that any injury that may

arise to one party or the other in that respect, will be rectified in the only way in which it can be rectified. But if we shut out the respondent from relying on the case he seeks to make, by requiring him to give particulars which he swears he cannot give, we may occasion a miscarriage of justice which can never be rectified. I therefore agree in thinking that the decision of the Judge of the Probate and Matrimonial Division ought to be affirmed.

Wright, Q.C.: I ask that the appeal shall be dismissed with costs against the petitioner.

FITZ GIBBON, L. J.: Is not there a rule in these matrimonial cases, that the husband should pay the wife's costs in any event?

Wright, Q.C.: That, no doubt, is the general rule; but it is subject to exceptions. The Judge has power, in particular cases, to refuse the wife's costs, and even to give costs against her; and when the Judge of Probate refused the motion, he made an order that the petitioner should pay three guineas costs, to be set off, *pro tanto*, against any costs payable to her.

FITZGIBBON, L. J.: That being so, we will dismiss the appeal with costs.

Solicitor for the petitioner: *N. Goddard.*
Solicitors for the respondent: *J. C. & A. Blake.*

G. Y. D.

Monroe, J.
1894.
Dec. 11, 14.

In the MATTER of the ESTATE of WILLIAM RUTTLEDGE, Owner and Petitioner.

Redemption of Rent Act—Fair rent—Tithe rentcharge.

The liability of a grantee under a fee-farm grant to pay tithe rentcharge is not altered by an order fixing a fair rent under the Redemption of Rent (Ireland) Act, 1891.

Motion on behalf of the owner and petitioner to have it declared that his interest in part of the lands of Tallaght was not to be sold subject to any liability to the payment of tithe rentcharge. The question arose on the settlement of the rental. It appeared that Sir William Palmer, in the year 1862, made two leases to William Stubbs of the lands for sale, to hold for terms of years, with a covenant by the lessor to renew the leases so often as he should himself obtain a renewal from the Archbishop of Dublin. While these leases were in existence Sir William Palmer purchased the fee-simple from the Ecclesiastical Commissioners, and required William Stubbs to take sub-grants from him. Accordingly, on the 24th February, 1868, Sir William Palmer made to Stubbs two fee-farm grants of the lands comprised in the leases, subject to the payment of certain rents over and above all taxes, charges, and impositions (quit-rent and crown-rent alone excepted). Stubbs held under these grants till, pursuant to the provisions of the Redemption of Rent (Ireland) Act, 1891, he applied to have a fair rent fixed as against the present owner, the assignee of Sir William Palmer, and by orders of the 24th January, 1893, fair rents were duly fixed by the Land Commission. From the date of the execution of the fee-farm grants down to the year 1891, no tithe-rent charge had been paid by the grantor; it had always, during that period, been paid by the grantee. None had been paid since.

Bartley, for the owner and petitioner:—

The liability of Stubbs, as grantee, to pay tithe rentcharge is

not affected by the order fixing a fair rent, but continues unaltered. [Counsel referred to 3 & 4 Wm. 4, c. 37, sects. 128, 149, 150, 152, 163: 6 & 7 Wm. 4, c. 99, sect. 1; 2 & 3 Wm. 4, c. 119, sects. 13, 14; 1 & 2 Vict., c. 109, sects. 7–10; O'Leary on Tithe Composition, pp. 10, 27, 28, 33]. Tithe composition was a personal demand merely, and did not constitute a lien on the lands. As to the *reddendum* clause in the fee-farm grant: *Palmer* v. *Power* (1); *Barcroft* v. *Welland* (2); *Gloster* v. *Murphy*. As to the effect of fixing a judicial rent on the antecedent contract of tenancy: *Bruce* v. *Steen* (4); *Hally* v. *Lane-Fox* (5); *Lurgan* v. *Johnston* (6); *O'Connor* v. *Smith* (7); *Mollan* v. *Kieran* (8). Under the 21st sect. of the Land Law Act of 1881, the leaseholders to whom the provisions of its sections applied, though on the expiration of their leases they were to be deemed present tenants, yet they were to be subject to the conditions of the expired leases, so far as applicable to tenancies from year to year. So, in the Land Law Act of 1887, upon the setting aside of a lease or grant in perpetuity, the tenant was to be subject to such conditions of the lease or grant as the Court should deem just. The provisions of the 21st sect. of the Act of 1881 are made applicable to the cases in which a fair rent is fixed in lieu of redemption of a fee-farm rent: see Redemption of Rent Act, 1891, sect. 1. Even if the fee-farm grant ceased to exist after the judicial rent was fixed, there would be nothing repugnant to the nature of the new tenure in holding the tenant still liable to tithe rentcharge. But the fee-farm grant continues: *Mollan* v. *Kieran* (8). The continuation of the existence of the fee-farm grant was the basis of his Lordship's judgment on the first branch of that case.

F. A. P. Hamilton, for Stubbs:—

The statute 1 & 2 Vict., c. 109, sect. 9, which deals with cases of change or surrender of tenancy provides for this case. All fee-farm grants do not come within the Redemption of Rent Act:

(1) 4 Ir. C. L. R. 191.
(2) 12 L. R. Ir. 35.
(3) [1894] 2 Ir. R. 49.
(4) 14 L. R. Ir. 408; see *per* Palles, C.B., p. 426.
(5) 18 Ir. L. T. R. 54.
(6) 20 Ir. L. T. R. 20.
(7) 20 L. R. Ir. 393.
(8) [1894] 2 Ir. R. 27.

Monroe, J. 1894. *In re* RUTTLEDGE'S ESTATE.

Alexander, Grantor; Macky, Grantee (1). The observations of Mr. Justice Bewley in *Mollan* v. *Kieran* (2), so much relied on, merely indicate that the tenant had got a perpetual interest. In *Gray* v. *Gray* (3) the Vice-Chancellor held that the fixing of a fair rent by agreement implied that a pre-existing lease had been surrendered. As to the 21st sect. of the Act of 1881, see *Bolton* v. *Barry* (4), where, although the members of the Common Pleas Division differed as to the right which the landlord was insisting upon, they all recognised the difference in the nature and incidents of the statutory tenancy from that which had previously subsisted under the expired lease. Further, it must be assumed that the fair rent includes the tithe rentcharge. The cases relating to county cess are merely decisions upon collateral agreements, which are as applicable to yearly tenancies as to fee-farm grants.

Dec. 14.

MONROE, J.:—

It was contended in the first place by Mr. Hamilton for the tenant that he had never been under any obligation to pay the tithe rentcharge, and that for twenty-three years he had been paying it in his own wrong. He referred to the terms of the old leases before the making of the grants, under which he argued that the lessor was bound to pay the tithe rentcharge, and that the grantee's liability could be no greater under the fee-farm grants. I do not go into the question as to former liability, as I am of opinion that when once the fee-farm grant was made the grantee was the owner of the first estate of inheritance, and was bound to pay the tithe rentcharge under the statute 1 & 2 Vict. c. 109. But then arose the question whether such liability has been affected by the fixing of the fair rent.

To determine this question, we have to look at the provisions of the Land Acts of 1881 and 1887, and the Redemption of Rent Act of 1891, all of which are to be read together. The Act of 1881 extended to all tenancies from year to year, or tenancies less than a tenancy from year to year, existing at the passing of the Act. It extended to tenants of a present tenancy save those

(1) 32 L. R. Ir. 485.
(2) [1894] 2 Ir. R. 27.
(3) [1894] 1 Ir. R. 65.
(4) 12 L. R. Ir. 158.

excluded by ss. 10, 11, 21, and 58. It did not apply to leases; but at the termination of a lease, the lessees if in *bona fide* occupation, provided the lease expired within sixty years after the passing of the Act, were to be deemed the tenants of present ordinary tenancies from year to year at the rents, and subject to the conditions of their leases, so far as such conditions were applicable to tenancies from year to year. The tenants to which the Act applied were to be at liberty to apply to have a fair rent fixed by an order of the Court, and when once that rent was duly fixed it could not be raised, nor could the tenant be disturbed by notice to quit for a period of fifteen years. The provisions of the old tenancy from year to year were not disturbed. It still continued subject to certain rights of resumption given to the landlord by sect. 5 of the statute; and, in the case of tenants whose leases had expired, to the larger powers of resumption given by sect. 21. Before the expiration of the statutory term either party might apply to have a new rent fixed. If no such rent was fixed the landlord would be remitted to his old right of ejectment on notice to quit.

The Act was one passed with the object of enabling fair rents to be fixed, and had in no way the object of altering the tenure of the lands. Under it fair rents were fixed, having regard to the interest of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district, and while the tenant paid his rent and violated no statutory condition, he could not be disturbed during the statutory term.

Then came the Act of 1887, and it seems to have had two objects in view. It enabled leaseholders to apply to have the privilege of having a fair rent fixed, whether their leases expired within sixty years after the passing of the Act of 1881, or not, and it enabled leaseholders to anticipate the expiration of their leases, and to apply at any time during the currency of the term. [His Lordship read the 1st sect.]

The language is peculiar. The person who, on the expiration of his lease under the Act of 1881, would be deemed to be a tenant of a present ordinary tenancy from year to year, at the rent and subject to the conditions of his lease, is to be *deemed* to be a tenant of a present tenancy, as if his lease had expired.

Monroe, J. 1894. *In re* Ruttledge's Estate.

There is no provision for putting an end to the lease. There is nothing to say the tenant is thenceforward to be a tenant from year to year. He is only to be *deemed* so; and I think this can only mean that he is to be deemed so for the purpose, and only for the purpose, of enabling him to apply to have a fair rent fixed at once. This would appear to be the view of Lord Justice Fitz Gibbon, when in *Looby* v. *Finch* (1) he observes:—"Under the distracting form of legislation adopted in the Land Acts of 1881 and 1887, we must under each Act successively deem persons to be *what they are not*, and then ascertain what their rights would be if they really held the hypothetical position attributed to them." So in *Wilson* v. *Smyth* (2) Mr. Justice O'Brien observes:—"As far as I can see there is nothing in the first section of the Act of 1887 determining the lease which should therefore be treated as still subsisting at the new rent." It would be strange if it were otherwise.

The effect of holding that in the case of leaseholders, the order fixing a fair rent would entirely alter the old tenure of the tenant's holding, might be enormous. Take the case of a lease for lives. If the order destroys the lease altogether, and creates a tenancy from year to year it might completely alter the construction or effect of any settlement or will in which the lands were dealt with, and must alter the devolution in case of an intestacy. If this is to be the effect of the order it should be explicitly stated by the Legislature as in the Local Registration of Title Act, and should not be left to the strained interpretation of the words of a statute which had entirely a different object in view. I learn on inquiry that where an order is made by the Land Commission to continue proceedings between the date of the Sub-Commissioners' order and the hearing of an appeal, the proceedings are invariably continued in the name of the tenant's heir-at-law, where the holding was originally held under a freehold lease. This is entirely in accordance with the view I take, that the devolution of the property is not altered by the order fixing the fair rent, and that the original lease continues to be subject to the new rent and the statutory conditions and rights of resumption which the statute imposes.

(1) 30 L. R. Ir. 568, 575. (2) 23 Ir. L. T. R. 7.

The last of this series of statutes is the Redemption of Rent Act, 1891, still further extending the right of having a fair rent fixed to grantees under fee-farm grants, where the grantor refuses to permit the grantee to redeem his rent. In such case the grantee is to be *deemed* to have made the prescribed application under section 1 of the Act of 1887, and is to be a tenant of a present tenancy, in manner and subject to the conditions and right of resumption mentioned in section 21 of the Act of 1881, as modified by section 1 of the Act of 1887, and his holding is to be subject to the provisions of the said Acts with regard to present tenancies.

There is nothing here expressly putting an end to the grant or transferring the fee-simple to the grantor. The Act was conceived for no other purpose than to enable a fair rent to be fixed and the grant remains as it was, subject to the new rent and the statutory conditions. The fair rent is as a matter of practice fixed by the Land Comission on the assumption that the grantee continues to pay the tithe rentcharge after the order fixing the fair rent has been made; and in *Mollan* v. *Kieran* (1), where a question arose as to whether a fine paid on the execution of a fee-farm grant should be considered in fixing a fair-rent, Mr. Justice Bewley observes: "If the fine has been paid to secure a perpetual interest, the Redemption of Rent Act leaves the interest an estate in fee-farm."

Answering the question therefore submitted to me, I am of opinion and so decide that the liability of a grantee under a fee-farm grant to pay the tithe rentcharge is not altered by an order fixing a fair rent under the Redemption of Rent Act 1891, and I direct the rental be settled on this assumption (2).

Solicitor having carriage: *J. P. O'Connor.*
Solicitor for Stubbs: *M'Gough.*

W. G.

(1) [1894] 2 Ir. R. 36.
(2) See *Mairs, Tenant; Lecky, Landlord*, [1895] 2 Ir. R. 475.

V.-C.
1895.
April 19.

RORKE *v.* ABRAHAM.

(1891. No. 12,747.)

Will—Construction—Gift of property to wife, to be disposed of as she thinks fit amongst children—Life estate with trust to dispose amongst children.

A testator bequeathed to his wife all his interest, right, and title that he was possessed of in certain real and personal property to be disposed of as she thought fit amongst his children during her life or by her will, provided she did not marry; but should she marry, then he ordered that his executors should enter into possession of his property and divide it amongst his children, or dispose of it as they thought proper for their benefit, paying to his wife £20, and she should have no further claim. The widow died without having married again, and without having made any disposition of the property:—

Held, that the widow had taken an interest for her life in the property, with a trust to dispose of same during her life, or by will, amongst the children; and that, as she had failed to make any such disposition, it was divisible amongst the children in equal shares.

FURTHER CONSIDERATION.

John Whitten made his will, dated the 14th May, 1879, as follows:—"I give and bequeath unto my wife Margaret Whitten all my interest, right, and title that I am now possessed of in my two farms situate in Fancroft in said county, also all my farming stock and chattel property together with £5 a-year to be paid out of Ballyduff, and willed to me by Joseph Abraham, to be disposed of as she thinks fit amongst my children during her life-time or by her last will and testament, provided she does not marry after my decease: but, should she marry, then and in that case, I order that my two executors, namely, William Rudd and William Abraham enter into possession of my farms and property aforesaid, and divide them amongst my children, or dispose of them as they think proper for their benefit, paying to my said wife Margaret Whitten the sum of £20, and she shall have no further claim. I appoint William Rudd of Roscrea and William Abraham of Glenkitt to be executors and trustees of this my last will and testament."

The testator died on the 31st July, 1879, seized and possessed of real and personal estate, leaving his wife, his eldest son Edward, and five other children him surviving. The will was proved by the executors, one of whom, William Rudd, subsequently died. On the testator's death his widow entered into possession of the property. She died on the 21st May, 1890, possessed of personal estate, intestate, without having married again, and without having exercised the power of disposition given by the will, and leaving her said six children surviving. Letters of administration of her personal estate were granted to Edward Whitten. The plaintiff was one of the other children, and she brought this action against William Abraham and Edward Whitten to have the real and personal estate of her father and the personal estate of her mother administered, and to have it declared that the real estate belonged to the children in equal shares.

Meredith, *Q.C.* (with him *Denning*), for the plaintiff :—

The children are entitled. It might indeed be contended on the authority of *Blakeney* v. *Blakeney* (1) that the widow took no beneficial interest at all; but it is not necessary to go so far. Manifestly what the testator intended was that the widow, if she so desired, should have the use of the property during her life, but that on her death (at the latest) the *corpus* should be "disposed of," *i. e.* distributed, amongst the children in shares to be fixed by their mother, provided that, if she married again, this power of fixing the amount of the shares should be exercised by the executors. In the case of *In re Haly's Trusts* (2) the legatee predeceased the testator, and there was no decision as to the estate taken by her; but it was held that the words "to be appropriated" were mandatory. The words here amount to a mandatory direction to divide the property amongst the children. *Morrin* v. *Morrin* (3), and other cases on precatory trusts, have no application.

Price, *Q.C.* (with him *F. Fleming*), for Edward Whitten :—

There is an absolute gift to the wife, with a superadded power

(1) 6 Sim. 52. (2) 23 L. R. Ir. 130. (3) 19 L. R. Ir. 37.

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of disposition amongst the children which does not cut down the absolute interest: *Howorth* v. *Dewell* (1); *Morrin* v. *Morrin* (2). Here no construction is possible intermediate between one giving an absolute interest and one which gives the wife no beneficial interest at all. The words "all my interest right and title" are unnecessary to pass the entire estate of the testator, but they serve to strengthen the words of gift, and to show that he intended his wife to take absolutely. The direction that if she married again she was to be paid £20 and have no further claim shows that she took in the first instance a beneficial interest, and there is nothing to cut this down to a life estate: *Howorth* v. *Dewell* (1). The words "to be disposed of" here are more indicative of ownership than the words "to be appropriated" in *In re Haly's Trusts* (3), which do not point to property in the donee. Moreover, in that case, if the gift had been held absolute there would have been a lapse and a partial intestacy. In *Blakeney* v. *Blakeney* (4) there was nothing to show that the testator's sister was to take any beneficial interest. In *Salusbury* v. *Denton* (5) where the words "to apply" and "to be at her disposal among" were held sufficient to create a trust, a moiety of the property was expressed to be given "absolutely," indicating by contrast that a trust was intended as to the remainder. In *Mackett* v. *Mackett* (6) the legatee was held absolutely entitled. In *Ahearne* v. *Aherne* (7) the gift was for the life of the donee, and Sir E. Sullivan, M. R. (p. 148), refers to the distinction taken by Lord Romilly in *Howorth* v. *Dewell* (1) between the case of an absolute interest and that of a gift for life with a superadded power. In the case of *In re Haly's Trusts* (3) the gift was not as here to the testator's wife; and in *Morrin* v. *Morrin* (2) the testator even described the legatee as a trustee.

Webb, for William Abraham.

Meredith, Q.C., in reply:—

In *Morrin* v. *Morrin* (2) the words "in order that" occurred

(1) 29 Beav. 18.
(2) 19 L. R. Ir. 37, 41.
(3) 23 L. R. Ir. 130.
(4) 6 Sim. 52.
(5) 3 K. & J. 529.
(6) L. R. 14 Eq. 49.
(7) 9 L. R. Ir. 144.

twice in the will, and it was necessary to give them the same meaning in the clause in question as in the earlier portion of the will, where they could not be held to create a trust. This is the key to the decision in that case: see the judgment, p. 42.

In the present case the testator has himself interpreted the words "to be disposed of," and has shown that he uses those words as referring to the execution of a trust—they occur in the admittedly mandatory direction to the executors. In *Salusbury* v. *Denton* (1), Sir W. Page Wood, V.-C., says (535):—"Here, I can have no doubt that the words 'to apply' and 'to be at her disposal among,' are clearly sufficient to create a trust; and that if this had been simply a bequest of the whole, to be at the widow's disposal among the testator's relatives in such proportions as she might direct, the widow dying without having so disposed of it, the whole would go to the plaintiff, as the testator's only child, and the only one of his relatives capable of taking within the Statutes of Distribution . . . ." *Howorth* v. *Dewell* (2) is not cited in Farwell on Powers, and in Hawkins on Wills it is referred to pp. 162–163, with a query. *Mackett* v. *Mackett* (3) was considered in *In re Haly's Trusts* (4), and distinguished: see p. 133.

THE VICE-CHANCELLOR:—

The will begins in this way:—"I give and bequeath unto my wife Margaret Whitten all my interest, right, and title, that I am now possessed of in my two farms . . . ." The words "all my interest, right, and title" were relied on by Mr. Price as showing that the testator intended his wife to take absolutely; but I am rather disposed to think that they are descriptive merely of the subject-matter of the gift, and are not to be taken as indicating the extent of the estate or interest given to the devisee. To show that this might be so, we could suppose the gift to be followed by the words "to be enjoyed during her life" and this would not be inconsistent with the earlier words. This, however, is not a matter of much consequence, for since the Wills Act, a simple gift of the lands would have been sufficient to carry the fee.

(1) 3 K. & J. 529.
(2) 29 Beav. 18.
(3) L. R. 14 Eq. 49.
(4) 23 L. R. Ir. 130.

V.-C. 1895.

RORKE v. ABRAHAM.

The real question arises on what follows:—"To be disposed of as she thinks fit amongst my children during her lifetime or by her last will and testament, provided she does not marry after my decease." In the first place, I hold that the bequest to Margaret Whitten does not contain any words necessarily indicating an absolute gift, and though it would be so construed even without the words "all my interest, right, and title," and under the Wills Act the entire estate would pass, still the gift is liable to be cut down by an indication of a clear intention so to do. Next, as to the words "to be disposed of as she thinks fit amongst my children." I cannot see here any precatory trust, which arises where a testator prays or beseeches or requests a legatee to deal with the property in a certain way, and where it must be assumed that the donee takes the absolute interest on which the trust operates, and out of which he is to make the disposition indicated. The words in the present case do not indicate merely a precatory trust. There is a mandatory direction to dispose of the property amongst the children. I cannot see any distinction between the words "to be appropriated" and those used in the present case; and here there is a gift with a mandatory direction that the devisee is to dispose of the property in the way the testator points out, namely, amongst his children. The words "during her lifetime or by her last will" do not throw much light on the case, save as showing that the widow had power during her whole life to appoint, that her doing so was not left optional with her, and that the testator created a trust which she was bound to exercise, and which was fastened on the property.

Then comes the provision that should the testator's wife marry, his executors should enter into possession of the farms and divide them amongst the children or dispose of them as they should think proper for their benefit, paying to his wife the sum of £20, and that she should have no further claim. As pointed out by Fitz-Gibbon, L.J., in *In re Haly's Trusts* (1), and as held in *Blakeney* v. *Blakeney* (2), the question might be whether Margaret Whitten took any beneficial interest, and there is room to contend that she did not; though I doubt if such a construction would fit in with

(1) 23 L. R. Ir. 130. (2) 6 Sim. 52.

the context which directs her to receive £20 and to have no further claim, and which shows that this sum was to be in lieu of something, which but for marriage, she would have a right to claim.

These considerations lead me to the opinion that the testator really intended his wife to have only a life estate with a power of disposition amongst the children. Suppose she were to take an absolute interest, and that she sold the property and converted it into money, and subsequently married again, there would be nothing for the trustees to divide, and the intention of the will would be defeated. This would be a strange result.

I hold that Margaret Whitten took an interest for her life in the property, with a trust to dispose of the same during her life or by will amongst the children; and that as she failed to make any such disposition the real estate is now divisible amongst the children in equal shares.

Solicitors for the plaintiff: *Hoey and Denning.*
Solicitors for William Abraham: *Moore & Sons.*
Solicitor for Edward Whitten: *William Bridge.*

D. M'C. M.

IN RE MICHAEL MURPHY, A BANKRUPT (1).

Appeal. 1895. May 2, 7.

Judgment—Not registered within twenty-one days from date of entering—Irish Bankrupt and Insolvent Act, 1857 (20 & 21 *Vict. c.* 60), *s.* 336—*Debtor's summons—Adjudication.*

A judgment, though not registered within twenty-one days from the date of its recovery, if sufficient in amount and otherwise valid, will support an adjudication in bankruptcy upon a debtor's summons taken out by the judgment creditor.

THOMAS DELANY obtained judgment against Michael Murphy on the 9th November, 1883, in an action for seduction, for the sum of £100 and £44 16*s.* 9*d.* for costs. The judgment was registered on the 11th December, 1883. No proceedings were taken on foot

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of the judgment at that time, as the defendant had no means. The defendant's father died on the 6th November, 1890, leaving a considerable amount of property. Delany obtained liberty to issue execution against the defendant, on foot of the judgment in the month of July, 1891, and the sheriff seized. Two men named Byrne and Gallagher claimed all the property under the will of the defendant's father. Delany authorised the sheriff to withdraw. A debtor's summons was issued by Delany against Murphy, and on non-payment Murphy was adjudicated bankrupt on the 23rd February, 1895. On an application to show cause against the validity of the adjudication, on the ground that the judgment was void, under sect. 336 of the Bankruptcy Act, 1857, through its not being registered within 21 days from the date of its being entered, Boyd, J., by order dated the 4th March, 1895, allowed the cause shown, and annulled the adjudication.

From that order the petitioning creditor appealed.

Meredith, Q.C., and *Robert Doyle* for the appellant:—

In any point of view we submit that the order of Boyd, J., is wrong, and we are entitled to sustain the adjudication. Even if sect. 336 of the Bankruptcy Act, 1857, will render the unregistered judgment void as against the assignees in bankruptcy, the result cannot follow until assignees are appointed. The question is—Whether there is a good subsisting debt as between the petitioning creditor and the bankrupt? We contend that there is. There is no necessity for registration of a judgment *inter partes*, and the section does not say that an unregistered judgment shall be void as against the debtor, but only as against his assignees in bankruptcy. But sect. 336 was not passed in relief of a debtor to enable him to get rid of his just liabilities, but in relief of the creditors of a bankrupt, and its true construction is that a judgment creditor, who has not registered his judgment within 21 days from its date, is, on the subsequent bankruptcy of the judgment debtor, to be put on the same footing as unsecured creditors: *Assignees of Kelly* v. *Keeffe* (1); *Gowan* v. *Wright* (2); *Bryan* v. *Child* (3).

(1) 17 Ir. C. L. R. 232. (2) 18 Q. B. Div. 201. (3) 5 Ex. 358

Matheson, Q.C., for Murphy:—

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The section cannot be limited to cases where execution has been issued. If not, then the effect is that immediately upon the appointment of assignees the judgment becomes void as against them. Their duty is to assert every right they have. *Ex parte Brown* (1) shows that the effect of non-registration is to destroy the debt in so far as it depends on the judgment. The judgment being void as against the assignees, the effect is to throw the creditor back upon the cause of action on which the judgment was founded. In this case it was damages for a tort, and not a debt or liability which is provable in bankruptcy without a judgment. The position of the petitioning creditor being that immediately upon adjudication he ceases to have a debt provable in bankruptcy, the Court will not go through the idle process of adjudicating, and the cause shown was rightly allowed.

WALKER, C.:—

May 7.

In this case it appears that on the 9th November, 1883, Thomas Delany recovered a judgment against Murphy for £144 16*s.* 9*d.* for the seduction of his daughter and for costs. In July, 1891, the sheriff seized goods, under an execution, but the execution was withdrawn in consequence of claims made upon the goods seized. The father of Murphy died on the 6th November, 1890, and the present proceedings were instituted under the belief that he had become entitled to some property under the father's will.

Thomas Delany, in 1895, served a debtor's summons, founded upon the judgment, and, default in payment having been made, presented a petition in bankruptcy, upon which, on the 23rd February, 1895, an adjudication of bankruptcy was made. On the 27th February, 1895, Murphy served notice to show cause against this adjudication, and Judge Boyd, by his order of the 5th March, allowed the cause and annulled the adjudication.

It was proved that the judgment was not registered in the office for registering judgments until the 11th December, 1883. Murphy, in his affidavit to show cause, swore he had no other creditor. Under these circumstances it was contended that the adjudication

(1) 17 Q. B. Div. 488.

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could not be sustained by reason of the provisions of sect. 336 of the Bankruptcy Act of 1857. [His Lordship read the sect.] The 334th and 335th sects. contain similar provisions with regard to warrants of attorney to confess judgment, pleas of confession, and the like, if not filed within the prescribed time. The 335th sect. provided that the provisions of 3 & 4 Vict. c. 105, with reference to the filing of warrants of attorney to confess judgment, shall be applicable to all pleas of confession and *cognovits actionem*, and all acknowledgments and consents for judgment, "and if at any time after 21 days, next after the execution or signing of any plea of confession, *cognovit actionem*, acknowledgment or consent for judgment, a petition of bankruptcy, shall be filed by or against the person who, by himself or his attorney, shall have given such plea, *cognovit*, acknowledgment, or consent for judgment, under which he shall be found and declared a bankrupt . . . then, unless such plea, *cognovit*, acknowledgment, or consent for judgment, shall, within 21 days from the execution or signing thereof, have been filed pursuant to the provisions of the same Act . . . such plea of confession, *cognovit*, acknowledgment, or consent for judgment, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees in bankruptcy."

There is clear authority that such legislation is made for the benefit of the creditors of the bankrupt, and not for that of the bankrupt. In *Gowan* v. *Wright* (1) the question turned on sect. 27 of the Debtor's Act of 1869, which provides that a Judge's order for judgment, made by consent of the defendant in a personal action, shall be filed in the Court of Queen's Bench, in the manner required by the sect., within 21 days from the making thereof, "otherwise the order and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be void." Lord Esher, in giving judgment, said—"If those words are to have their fullest effect given to them, a man who does not deny his original liability, and consents to a Judge's order to avoid costs, can take advantage of the failure to file the order, a matter which, as between him and the judgment creditor, does not affect the position of affairs in the least. The effect would

(1) 18 Q. B. Div. 201.

appear positively to go as far as this, that after execution issued the judgment debtor could turn round and say that all the proceedings which had taken place with his consent were null and void, that there was nothing to support the execution, and, so far as I can see, that both the judgment creditor and the sheriff were liable to an action of trespass in respect thereof. If we can avoid arriving at such an extraordinary result, I think we ought to do so, and therefore we must consider the provisions of the Act to see if they compel us to hold that the judgment debtor's contention is correct." Lindley, L. J., said—"I agree that the true construction of the section must be that the Judge's order and judgment are to be void as against creditors, not as against the judgment debtor himself . . . . I cannot understand the expression 'fraudulent,' in the 26th section, otherwise than as showing that the object simply was to render the instruments void as against creditors of the judgment debtor; I do not say only as against trustees in bankruptcy, but as against all creditors with whom the holder of the judgment comes into competition."

Since the argument we have been referred by counsel to the case of *Ex parte Guest* (1). There a Judge's order to enter up judgment in an action by the creditor against the debtor was made by consent; but the judgment creditor failed to file the Judge's order within twenty-one days in accordance with the provisions of sect. 27 of the Debtor's Act, 1869. After that time had elapsed he issued a bankruptcy notice against the debtor—a proceeding the same as a debtor summons. An application was made to the registrar to set aside the notice on the ground that the judgment had not been filed. The Court held that the bankruptcy notice founded on such a judgment was good. Lord Esher, in giving judgment, said:—"A judgment was obtained against this debtor by his own consent. He did not pay, and thereupon a bankruptcy notice was issued against him by the judgment creditor. The debtor applied to the Court of Bankruptcy to set aside that notice on the ground that the judgment had not been filed. It has been held in *Gowan* v. *Wright* (2) that the non-filing of a judgment does not make the judgment void as between the

(1) 37 W. R. 21. (2) 18 Q. B. Div. 201.

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judgment debtor and the judgment creditor. The result of that case is that the judgment debtor could not have applied to the Court to set this judgment aside. As betwen them the judgment is valid, and execution issued on such a judgment would clearly be good. That being so, who is applying to get rid of the effect of that judgment? It is the debtor himself. It is said there may be other creditors, though there is no evidence that there were any, and that what is being done will injure these supposed creditors. How will they be injured? If the notice is allowed to stand the case will go into bankruptcy, and the judgment will not injure other creditors, because as against them it will not be a good judgment; but this creditor's debt will be there, and he will have the right to prove for that under any circumstances. The debtor is trying on his own behalf to make this judgment ineffective. No creditors have come to say they do not want him to be made bankrupt. I think that this case is not governed by *Ex parte Lennox* (1), but that it comes directly within the words of *Gowan* v. *Wright* (2), and that the result is that this judgment is good for the purposes of founding a bankruptcy notice upon it." And Lindley, L.J., said:—"It was held in *Gowan* v. *Wright* (2) that, according to the true construction of the section, a judgment which is not filed is not void as against the debtor. Against him it can be enforced in any way in which a judgment is capable of being enforced. Therefore a bankruptcy notice may be issued upon it."

I think that case establishes what entirely falls in with justice, viz. that this judgment can, as against Murphy, found a trader debtor summons, and therefore a bankruptcy. There was an act of bankruptcy against him when he omitted to pay. Mr. Matheson admitted there was a good debtor summons, but he said there were existing assignees, and therefore the judgment was void against them; but he seeks to prevent the existence of assignees, and yet relies on their *status* for that purpose. I do not say that this judgment will be provable against other creditors so as to rank with them, nor do I say that under the 43rd G. O. the adjudication converts this judgment creditor into a proved creditor. All I hold

(1) 16 Q. B. Div. 315. (2) 18 Q. B. Div. 201.

is that Murphy cannot raise the question of the invalidity of this judgment, and that as against him the adjudication is valid. Murphy swears this is the only debt, and it seems strange to me, when the judgment is absolutely indisputable against Murphy, that he should be entitled, when the rights of others having claims on his property are settled, or, if there are no such others, to call upon the assignees to hand over to him the property, leaving unpaid the judgment which binds him.

I confine myself, however, to deciding that Murphy is not entitled, upon the grounds assigned, to annul the adjudication. The attention of Judge Boyd was not called to the cases cited before us, and *Ex parte Guest* (1) was not referred to till after the argument had closed. We must vary the order by declaring that the cause shown by Murphy should be disallowed, and that the petitioner should have his costs in the Court below against Murphy, and also that Murphy should pay the costs of this appeal.

FITZ GIBBON and BARRY, L.JJ., concurred.

Solicitors for the petitioning creditor: *Brown & M'Cann.*
Solicitors for the bankrupt: *Reid & Son.*

R. D. M.

(1) 37 W. R. 21.

Appeal.
1894.
Feb. 23, 26, 28.
March 2.

EARL OF MOUNTCASHELL *v.* SMYTH (1).

(1892. No. 916.)

Will—Republication by codicil—Date of—Bringing down the will to the date of the codicil—Contrary intention—Settlement—Covenant to settle.

R. S., by will dated the 30th April, 1836, devised all his estates to the use of his daughter Charlotte S., for life, with remainder to her first and every other son in tail male, with remainder to six other persons (brothers and nephews of the testator) as tenants for life, with remainder to their first and other sons in tail male, with remainders over. The testator provided that it should be lawful for his said daughter, or any person who should be by virtue of the said limitations in the actual possession of or entitled to the receipt of the rents of the lands thereby devised, at any time, whether sole or covert, by any deed or instrument in writing to limit or appoint to the use of or in trust for any and every husband or wife whom his said daughter, or such person as aforesaid, should or might thereafter marry, for his or her life, any annual sum or sums of money or yearly rentcharge or rentcharges at the yearly rate of £8 for every £100 by the year of such portion as such husband or wife should pay or settle, not exceeding in the whole the yearly sum of £1000.

By a codicil to his will, dated the 18th June, 1855, the said R. S. limited an estate in tail female to the daughters of his daughter Charlotte, on the condition that if they married, they and their husbands should take the name and arms of S. The testator then provided that, his daughter Charlotte S. having married C. W. M., he bequeathed to her the whole of his estates and property for life, on condition that all the regulations, stipulations, and reservations in his will should be carried out by her and her husband. The testator added a second codicil dated the 18th April, 1858, which did not alter or revoke any of the provisions already mentioned.

In 1848, on the marriage of Charlotte S. with C. W. M., by indenture dated the 17th January, 1848, sums of £10,000, secured by mortgage, the fortune of C. W. M., and £10,000 Irish currency, the fortune of Charlotte S., were assigned to trustees upon trust to pay £100 a-year to the wife for pin-money, subject thereto upon trust to pay the income to C. W. M. for life; and after his death, in case the wife survived, to pay her £400 a-year for jointure; and after the death of husband and wife in trust for the children as the husband should appoint; and in default of such appointment, as the wife should

(1) Before WALKER, C., and FITZGIBBON and BARRY, L.JJ.

appoint; and, in default of appointment by either husband or wife, then for the children equally.

There were four children issue of the marriage, namely, Richard Charles, Harriette Gertrude, Helena, and Charlotte. R. S. the testator died in 1858. By indenture, dated the 10th April, 1865, Charlotte S., in pursuance of the power in the will, granted to C. W. M. a rentcharge of £800 a-year for his life, to commence from her death, and appointed the lands devised by the will to W. as trustee for 200 years to secure the same. After Richard Charles came of age the entail was barred, and by deed dated the 12th January, 1881, the estates were resettled, after the death of Charlotte S., to the use of Richard Charles for life, with remainder in tail male, with remainder to Harriette Gertrude for life, with remainders over. Richard Charles died in 1888 leaving an only child, Claude, who died an infant. Charlotte S. died in 1892, whereupon Harriette Gertrude became entitled to the estates, but refused to pay the rentcharge of £800 a-year:—

Held, (affirming the decision of Porter, M.R.), 1, That, although the codicils operated as a republication of the will, and for certain purposes brought down the date of the will to that of the codicils, they did not alter the construction of the will, and therefore the words "hereafter" and "may marry" were to be read as of the date of the will.

2. That the consideration for the raising of the rentcharge of £800 a-year, as prescribed by the will of 1836, was satisfied by the terms of the settlement of 1848 in settling the mortgage for £10,000.

RICHARD SMYTH, by his will dated the 30th April, 1836, devised all his estates of Ballynatray with its sub-denominations, of which he was seized in fee, and the lands of Gortgarriffe, in the county of Limerick, of which he was also seized in fee, and all his estates in Cork and Waterford, to his daughter Charlotte Mary for life, with certain limitations over, which, so far as material, will be found stated in the judgment of the Lord Chancellor, *infra*, p. 356. The will contained a provision that it should be lawful for his daughter, or any person who by virtue of the said limitations should for the time being be in the actual possession of or entitled to the receipt of the rents and profits of the hereditaments thereby devised, at any time or times, or from time to time, either before or after marriage, and whether sole or covert, by deed or instrument in writing, revocable or irrevocable, to limit or appoint to the use of or in trust for any and every husband or wife whom his said daughter, or such person ~~as aforesaid~~, ~~should~~ or might thereafter marry, for his or her life, any annual sum or sums of

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money or yearly rentcharge or rentcharges, at the yearly rent of £8 for every £100 by the year, of such portion as such husband or wife should pay or settle on his said daughter or such person as aforesaid, not exceeding in the whole the yearly sum of £1000. And for the purpose of securing such annual sum or sums or yearly rentcharges so to be appointed as aforesaid, he declared and devised that it should be lawful for her or them to limit and appoint the usual powers and remedies for recovering and enforcing payment thereof by distress and entry by perception of the rents and profits of the said hereditaments so to be charged as aforesaid, to any person or persons whomsoever for any term or terms of years as to her or them should seem meet, but so that any such term be made to determine on the death of the person for the benefit of whom the same should be created, and the payment of the arrears of his rentcharge, and the expenses incurred by the non-payment thereof.

The testator made a codicil to his will, dated the 18th June, 1855, in the following terms:—"Having made alterations in said will, and having revoked or cancelled all other codicils made by me, my will and desire now is that the clause in p. 5 of my will, and commencing at the seventh word of the twenty-eighth line ('and in default, &c., &c., and ending of her body'), being the sixth, seventh, and eighth words of the thirty-ninth line of said p. 5 respecting the daughters of my child Mary (who has now three daughters) be inserted, and take place between the words 'Smyth' (here insert the clause 'then'), being the eighth and ninth words of the thirty-ninth line of the second page of said will, as my wish and desire is that they and such daughters as said Charlotte Mary may have may come under the intent and meaning of said clause, and that they should take precedence of my late brother Henry's children and all others as in succession mentioned in my said will, on the conditions that they if they marry, that they do so with the consent of their parents and guardians; and that they and their husbands do take and assume the arms of 'Smyth,' and likewise the surname of 'Smyth,' and their descendants do likewise from time to time for ever. And my further desire and wish is that they should strictly observe all the stipulations, limitations, and restrictions as contained in my said will, and be subject to the penalties thereto for non-compliance

with what is set forth in said will, to be observed by those who may inherit my estates and property. My daughter, Charlotte Mary, having married the Hon. Charles W. More, I leave and bequeath to her the whole of my estates and property for her own and separate use during her life, but first paying out of same all my just and lawful debts, or the interest thereof, as the creditors may desire, as well as those persons to whom I have left legacies. Likewise I do curtail and limit the sum of £15,000 to the sum of £8000 for younger children, to be divided among them at such times and portions as my said daughter Charlotte may think proper to allocate among her said younger children; and I leave my estates and property subject thereto. But should my said daughter Charlotte have a son, I trust his education and any other son she may have may be closely attended to, and should hope that her husband, the Hon. Charles, may closely attend to the same, as well also to the education of all their children. When I bequeath my estates and property to my said daughter for her life, I do so on the express conditions that all the regulations, stipulations, and reservations as mentioned in my said will be carried out by her and her husband as fully as set forth in said will, and if possible more fully to accomplish my wishes as therein detailed. My further will and desire is that whoever inherits my estates and property is only to consider himself or herself as tenants for life to the same for ever."

On the 18th April, 1858, the testator made a second codicil to his will, not material to the questions raised in this case.

In the month of January, 1848, the plaintiff (who was then the Hon. Charles William More) married Charlotte Mary Smyth, and previous thereto two deeds were executed. By the first, a mortgage, dated the 17th January, 1848, and made between Stephen, Earl of Mountcashell, of the first part, the plaintiff of the second part, the said Richard Smyth and Charlotte Mary Smyth of the third part, and Alfred William Cleverly and William St. Leger Alcock Stawell of the fourth part, the Earl of Mountcashell granted his estates in the Lough or territory of the Braid, in the county of Antrim, to Alfred William Cleverly and William St. Leger Alcock Stawell for 1000 years by way of mortgage to secure the sum of £10,000 as the fortune of the

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plaintiff, to hold the same on the trusts of the marriage settlement next hereinafter mentioned, and which was also dated the 17th January, 1848, and was made between the plaintiff of the first part, Charlotte Mary Smyth of the second part, the Earl of Mountcashell of the third part, the said Richard Smyth of the fourth part, and the said Alfred William Cleverly and William St. Leger Alcock Stawell of the fifth part, and by the said settlement the said sum of £10,000 secured by the aforesaid mortgage and a sum of £10,000 Irish, equivalent to £9230 15*s.* 5*d.*, the fortune of Charlotte Mary Smyth, were assigned to Alfred William Cleverly and William St. Leger Alcock Stawell, and it was declared that the said trustees should stand possessed of the said sums upon trust out of the dividends to pay during the joint lives of the plaintiff and the said Charlotte Mary Smyth the annual sum of £100 for her sole and separate use, and subject thereto upon trust to permit the plaintiff and his assigns to receive the income for life, and after his death to permit Charlotte Mary Smyth, in case she survived, to receive out of the £10,000 and £9230 15*s.* 4*d.* an annuity of £400 in full of jointure and in lieu of dower, and subject thereto in trust for the children as the plaintiff should appoint, and in default of such appointment then as Charlotte Mary Smyth, in case she survived him should appoint, and in default of such appointment, then for all the children equally.

There was issue of the marriage of the plaintiff and Charlotte Mary Smyth, four children, namely, Richard Charles More-Smyth (since deceased), Harriette Gertrude Isabella More-Smyth, Helena Anne More-Smyth (since deceased), and Charlotte Adelaide Riversdale More-Smyth.

In the year 1855 the sum of £10,000, secured by the mortgage of the 17th January, 1848, was paid to Alfred William Cleverly and William St. Leger Alcock Stawell, the trustees of the settlement of the 17th January, 1848.

Richard Smyth, the testator, died on the 19th April, 1858, without having altered or revoked his will and codicils, leaving the said Charlotte Mary Smyth, his only child, him surviving.

By indenture dated the 10th April, 1865, and made between Charlotte Mary Smyth of the first part, the plaintiff of the second

part, and Cuffe Wall of the third part, the said Charlotte Mary Smyth in consideration of the settlement of the £10,000, the plaintiff's fortune settled by the said indenture of 17th January, 1848, and in exercise of the power reserved by the will, appointed to the plaintiff an annual rentcharge of £800, being £8 per cent. of every £100 which the plaintiff settled upon his marriage with her, to be payable out of and charged upon the several hereditaments and premises devised to the said Charlotte Mary Smyth by the said will, to hold the said annual rentcharge to the plaintiff and his assigns from the death of the said Charlotte Mary Smyth for the term of his natural life, in case he should survive the said Charlotte Mary Smyth, payable quarterly. The said indenture contained the usual remedies for enforcing payment of the said annuity, and the said Charlotte Mary Smyth, for the better securing the said rentcharge, appointed unto the said Cuffe Wall, his executors, administrators, and assigns, the lands of Ballynatray in the county of Waterford, and also certain other property in the city of Cork being the lands devised to the said Charlotte Mary Smyth by the said will, for the term of 200 years determinable on the death of the plaintiff, Charles William More-Smyth, and payment of all arrears of the said rentcharge, upon trust in case of default in payment of the rentcharge, to raise all arrears thereof by the means therein mentioned.

By an indenture dated the 20th December, 1880, and made between the said Charlotte Mary Smyth of the first part, Richard Charles More-Smyth (her only son) of the second part, Richard Oliver Aldworth, William Percival Maxwell and Wallis Adams of the third part, and Philip Bass of the fourth part, the said Richard Charles More-Smyth as first tenant in tail under the will of the said Richard Smyth with the assent of Aldworth, Maxwell, and Adams, who were then protectors of the settlement made by the said will, and also with the assent of the said Charlotte Mary Smyth, barred the estate tail in the estates devised by the said will, and limited the estates subject to the charges affecting them to such uses as the said Charlotte Mary Smyth and Richard Charles More-Smyth should by deed appoint.

By indenture dated the 12th January, 1881, and made between the said Charlotte Mary Smyth of the first part, Richard Charles

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More-Smyth of the second part, Harriette Gertrude Isabella Smyth of the third part, Charlotte Adelaide Riversdale More-Smyth of the fourth part, Charles William More-Smyth (the plaintiff) of the fifth part, Henry Villiers Stuart and Henry Philip Chearnley of the sixth part, and Stephen More and Robert Percival Maxwell of the seventh part, the said Charlotte Mary Smyth, and Richard Charles More-Smyth, in exercise of the powers for this purpose given to them by the indenture of the 20th December, 1880, appointed that the lands devised by the will of Richard Smyth should be to the use of the said Stephen More and Robert Percival Maxwell their executors, administrators, and assigns, for 1000 years from the death of the said Charlotte Mary Smyth, upon certain trusts therein declared and subject thereto to the use of Richard Charles More-Smyth, for life, with remainder to his first and other sons in tail male, and after divers other limitations, with remainder to Villiers Stuart and Chearnley, upon trust to pay the rents to the said Harriette Gertrude Isabella Smyth during her life, with remainders over.

The said Richard Charles More-Smyth died on the 3rd January, 1888, leaving him surviving an only child, Claude Stephen Smyth, who died on the 1st October, 1890, an infant and unmarried. Henry Villiers Stuart and Henry Philip Chearnley never acted in the trusts of the before-mentioned deed, and declined to act as such trustees, and the said Cuffe Wall had died.

Prior to the 6th October, 1891, the plaintiff succeeded to the title of Earl of Mountcashell, and became entitled to an estate for life in the lands in the counties of Cork and Tipperary, known as the Mountcashell or More Park estates, under the trusts of an indenture dated the 7th October, 1846, and made between the Right Hon. Stephen Earl of Mountcashell, of the first part, the Honorable Stephen More, Viscount Kilworth, of the second part, John Hyde and Matthias Hendley of the third part, and the Right Honorable Robert Edward Viscount Lorton and Charles Tankerville Webber of the fourth part, whereby it was amongst other things provided that, in respect of a term of 1000 years thereby limited, it should be lawful for every male tenant for life under the limitations therein contained, either in contemplation of marriage or after marriage, by

deed or will to appoint to or in favour of any woman he should marry, in the event of her surviving him, a yearly rentcharge of £1000, issuing out the lands and premises thereby settled, payable for the life of such woman, for jointure and in bar of dower and thirds, on such days and in such manner as the appointor should direct.

By indenture, dated the 6th October, 1891, the plaintiff Charles William, Earl of Mountcashell, in exercise of the power aforesaid, appointed to the said Charlotte Mary, Countess of Mountcashell, his wife, and her assigns during her life, in case she survived him a yearly rentcharge of £1000 sterling charged upon and payable out of the lands and premises situate in Cork and Tipperary, comprised in the said deed of the 7th October, 1846. The deed of the 6th October, 1891, contained the usual remedies for recovering payment of the said rentcharge.

Charlotte Mary, Countess of Mountcashell, made her will on the 23rd January, 1891, and thereby confirmed to the plaintiff, her husband, the annuity of £800 a-year. She died on the 17th January, 1892. On her death the defendant, Lady Harriette Gertrude Isabella Smyth, under the limitations in the deed of 12th January, 1881, became entitled to the estates devised by the will of Richard Smyth, and had gone into possession thereof. She refused to pay the rentcharge of £800 a-year, and the Earl of Mountcashell brought this action to enforce payment thereof.

The Master of the Rolls gave judgment for the plaintiff, and from that judgment the defendant appealed.

Serjeant Jellett, Q.C., *Kenny, Q.C.*, and *Blood*, for the appellant :—

The first question is from what time does the will speak? The codicil is a republication of the will, and brings down the will to the date of the codicil itself: *Winter* v. *Winter* (1); *Re Goods of Lady Truro* (2); *Anderson* v. *Anderson* (3); *Smiles* v. *Blackburn* (4). The doctrine of the republication of a will by a codicil was as strong before the Wills Act: *Duppa* v. *Mayo* (5);

(1) 5 Hare, 306.
(2) L. R. 1 P. & D. 201.
(3) L. R. 13 Eq. 381.
(4) 43 Ch. Div. 75.
(5) 1 Saunders' Rep. 275.

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Goodtitle v. *Meredith* (1). All these cases show that the codicil, if it refers to the will, brings the latter down to the date of the codicil. The effect is to give operation to the codicil, *per se*, and independently of any intention, so as to bring down the will to the date of the codicil, making the will speak of that date, unless indeed a contrary intention can be shown.

The second question is—Did the will point to a marriage after the date of the will? It clearly does. The words "may" and "hereafter," apply to a future marriage of the daughter and not to a marriage which had taken place at the date of the publication of the will: *Dillon* v. *Dillon* (2).

The third question is—Have the conditions which enabled the power to be exercised been complied with? This clause in the will would have given this lady a most important power in the event of her surviving her husband and marrying a second time. The testator left the power as it was and did not alter it. There were two sums of £10,000, one brought in by Lord Mountcashell, and the other by Richard Smyth; each of these sums was withdrawn from the control of the parties who brought it in, and each of these sums formed the equivalent consideration for the other. The sum to be the consideration for the exercise of the power must be a sum within the control of the husband at the time the power is called into operation. The £10,000 was exhausted by supplying a consideration for the settlement of 1848, and could not furnish consideration for execution of the jointuring power.

But assuming that the words of the power would refer to a marriage before the date of the will, we submit that the conditions on which the power arose were not complied with. The words are, "shall pay or settle." Confessedly it was never paid, and we submit this was not such a settlement as would be sanctioned by a Court of Equity. The provision made for Mrs. More-Smyth was that she got £100 a-year pin-money during the joint lives; she had a jointure of £400 a-year in bar of dower and thirds at common law; she had no power of appointment during her husband's life; she had a power as survivor, but only during her widowhood; and if there were no children the whole fund went absolutely to

(1) 2 M. & S. 5. (2) 11 Ir. Eq. R. 423.

him. This would not be considered a reasonable settlement if the Court were settling property on behalf of a minor, or if it were asked to decide a question on an equity for a settlement on behalf of a married woman: *Loch* v. *Bagley* (1); *Young* v. *Macintosh* (2); *Duckett* v. *Thompson* (3). Mrs. More-Smyth should have a separate estate in at least one moiety, and a joint power of appointment: *Cogan* v. *Duffield* (4); *Re Gowan* (5).

Serjeant Campion, Q.C., Twigg, Q.C., and *F. Fleming*, for the respondent:—

A codicil, by sect. 34 of the Wills Act, only republishes a will so far as may be necessary or so far as there is not a contrary intention: *Winter* v. *Winter* (6). Here it is plain from the provisions of the codicil with respect to the daughter and the husband whom she had married, that the word "hereafter" must be read from the date of the will. *Dillon v. Dillon* (7) does not apply, because the will in that case pointed to a future marriage. The mortgage for £10,000 was settled on behalf of the plaintiff so as to form a good consideration for the rentcharge. The words are "pay or settle," and that means such fair and reasonable provision for a wife and children of a marriage as a Court of Equity would consider right: *Earl of Tyrconnel* v. *Ancaster* (8); *Brereton* v. *Barry* (9).

The authorities cited on the other side were all cases of executory trusts. In *Duckett* v. *Thompson* (3) there was a direction to settle a legacy upon the legatee; in *Loch* v. *Bagley* (1) there was direction to make a strict settlement; in *Charlton* v. *Rendall* (10) the trustees had a discretion as to the form of the settlement; in *Young* v. *Macintosh* (2) there was an intention shown that a settlement was to be made on the children of the legatee. The test is—Was it a fair and *bona fide* settlement, having regard to all the circumstances of the case? Farwell on Powers, p. 526.

(1) L. R. 4 Eq. 122.
(2) 13 Sim. 445.
(3) 11 L. R. Ir. 424.
(4) 2 Ch. Div. 44, 49.
(5) 17 Ch. Div. 778.
(6) 5 Ha. 306.
(7) 11 Ir. Eq. R. 423.
(8) 2 Ves. Sen. 499.
(9) 10 Ir. Ch. R. 376.
(10) 11 Ha. 296

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Serjeant Jellett, in reply:—

The effect of the 34th sect. of the Wills Act is that the republishing of a will brings down the will to the date of republishing, and makes it speak as a new will from that time. The use of adverbs of time such as "now" and "hereafter," cannot take the case out of the rule. *Cole* v. *Scott* (1) does not apply; there was no republication in that case, but there the date of the will as contrasted with the time of the testator's death was referred to in the will, and that was held to be evidence of a contrary intention: see *Re Ord* (2). In *Hopwood* v. *Hopwood* (3) a bequest was adeemed expressly. *Bullock* v. *Bennett* (4) and *Everett* v. *Everett* (5) were decisions as to the effect of marriage after a will, and in the testator's lifetime.

As to the third question—taking it either as an executed or executory trust, the money was not settled by either of the three *criteria* known to a conveyancer: (*a*) an executory trust; (*b*) an infant's settlement; (*c*) an equity to a settlement.

March 2.

WALKER, C.:—

The rentcharge, which it is the object of this action to raise and establish, has been assailed by the appellant upon two grounds:—(1) that the husband, before it was created, ceased to be an object of the power to charge it; and (2) that the power was not well exercised, because the condition required for its exercise by the will had not been complied with. These questions received, during the argument, separate treatment, and must be separately dealt with by us.

Richard Smyth, by his will dated the 30th April, 1836, devised his estates to the use of his daughter, Charlotte Mary Smyth, for life, with remainder to her first and other sons in tail male, with various remainders over to his brothers and nephews in like strict settlement, with remainder to the first and every other daughter of his daughter, Charlotte Mary Smyth, in tail male, with remainder in tail general. The will interposed between the estate first given

(1) 1 M'N. & G. 518.
(2) 12 Ch. Div. 22.
(3) 7 H. L. Cas. 728.
(4) 7 D. M. & G. 283.
(5) 7 Ch. Div. 428.

to his daughter and her sons, and the remainder to her daughters, limitations in strict settlement to six named persons, Henry Mitchell Smyth, Grice Richard Smyth, Henry Smyth, the Rev. Grice Smyth, Rowland Bateman Smyth, and John Rowland Smyth. Then comes the power in question, and it must be remembered that it is applicable to seven tenants for life, one female and six males, so that if all these married before the codicil every existing husband and wife would be excluded, according to the appellant's argument, from the scope of the power.

It is to be observed that under the second branch of the same power every male tenant for life in possession might charge portions for younger children.

It also provided that "whosoever shall marry my said daughter Charlotte Mary Smyth," shall take the name of Smyth, with a forfeiture clause if he does not do so within a year after his wife becomes entitled in possession, and there is a substituted provision in case she marries a peer. Then comes the codicil of June, 1855. [His Lordship read the codicil].

The last codicil is dated the 18th April, 1858. The contention is that the will is brought down to the date of the codicil, and the words "hereafter marry" must mean a marriage *after that*, and therefore can only be applicable to the case of second marriages of all tenants for life if they were already married in June, 1855. Serjeant Jellett relied on sect. 34 of the Wills Act in aid of the old law as to republication. The Act introduces new modes of making a will and new rules of construction and new provisions, *e.g.* sect. 24, and sect. 33: there are others which might be mentioned. Sect. 34 provides:—"That every will, re-executed or republished or revived by any codicil, shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived."

I agree that the case must be considered as if the testator, in June, 1855, made a will in the very words of the will of 1836, but how far the doctrine is to be pushed is the question. In *Winter* v. *Winter* (1) the bequest to the son, by the will of 1837, would have lapsed by the old law He died after it. The republication in

(1) 5 Ha. 312.

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1839 made the will read as a bequest to the deceased son, and then sect. 33 operated, but the construction of the words of the will was not altered. The law of sect. 33 operated on the facts. The general rule may be taken to be—"The republication of a will is tantamount to the making of the will *de novo*. It brings down the will to the date of the republishing, and makes it speak as it were at that time. In short, the will so republished is a new will."—1 Williams on Executors, p. 170. The rule is also stated in *Re Truro* (1); and in *Anderson* v. *Anderson* (2) there was merely removed the disqualification created by the legatee being an attesting witness. *Bullock* v. *Bennett* (3) seems to me not much of an authority on the question of the effect of republication. It does, no doubt, decide that the marriage to be dealt with was one after the will, and not after the death. In *Smiles* v. *Blackburn* (4) the decision on the effect of republication affirmed the language and construction of the will. The testator, by his will, purported to exercise every power of which he should be possessed at the time of his death. *Dillon* v. *Dillon* (5) would of course be a conclusive authority that if the daughter were married before the will the clause would not apply. I do not think any of the cases cited for the appellant decide that the words "hereafter marry," which determine an object and a person, are to be referred by the republication to a different object and person.

Let us see some of the authorities on the other side. In *Hopwood* v. *Hopwood* (6) Lord Campbell, L.C., said—"Although a codicil confirms a will, and, for certain purposes, brings down the will to the date of the codicil, it certainly does not make the will necessarily operate as if the will had been originally made at the date of the codicil." We called attention during the arguments to the language of Patteson, J., in *Doe* d. *Biddulph* v. *Hole* (7), a case which turned on a custom existing at the date of the will, where he says—"Upon the second point it is clear that a codicil confirming a will makes the will for many purposes to bear the date of the codicil; but this rule is subject to the limitation that the intention of the testator be not defeated thereby. Here the codicil is for the

(1) L. R. 1 P. & D. 205.
(2) L. R. 13 Eq. 381.
(3) 7 De G. M. & G. 283.
(4) 43 Ch. Div. 75.
(5) 11 Ir. Eq. R. 423.
(6) 7 H. L. Cas. 740.
(7) 15 Q. B. 848.

sole purpose of providing for a younger child. The plaintiff contends that it has also the effect of altering the subject of a devise contained in the will, unconnected with that purpose, and of rendering the power less beneficial to the grantee."

In *Re Farrer* (1) the testator acquired property between the date of the will and the codicil, but the will provided that all freehold property acquired subsequent to the date of the will was to be dealt with as the primary fund for payment of bequests to his son and daughters, and it was held that a sufficient intention appeared on the face of the will that subsequently acquired real estate should not pass under the devise to uses in the will. *Stilwell* v. *Mellersh* (2) was a case of an advance made between the will and the codicil. I read during the argument the observations of Lord Cottenham in his judgment, and I shall not repeat them.

It is curious that one of the absurdities that would follow if we adopted the appellant's contention was the absurdity sought to be established in *Ogle* v. *Sherborne* (3), where a testator bequeathed a silver cup to Lord Sherborne and his heirs as an heir-loom. The person who was Lord Sherborne at the date of the will died before the testator, leaving a successor to the title, and it was held that the bequest lapsed, though the design was that the cup should be used as an heirloom. But after all, the strongest argument in favour of the plaintiff's view is to be found in the language of the will and codicil themselves. There is a clause in the will—"And in case a son should be born to me at any future time by my said wife" then the estates are to go, in the first instance, to such son and the heirs male of his body; in case another daughter was born, then the estates are to be charged with £10,000 for her, "and in case my daughter, Charlotte Mary Smyth, should die without male issue, that such daughter should be the person next beneficially entitled to the said lands for her life, with limitations to her eldest and other sons in tail male." It would follow, if the argument of the appellant is right, that if Richard had been born between the date of the will and the codicil, Richard would have been excluded. Could that be so? Then take the codicil. [His Lordship read the portion of it at p. 349.] The will and codicil must be read

(1) 8 Ir. C. L. R. 370. (2) 20 L. J., N. S. Ch. 356. (3) 34 Ch. D. 446.

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together, and I think the codicil is itself an affirmation that the construction of the will as framed was intended to remain, and the stipulations and provisions to apply to the actual living husband, and not a possible second one. In result I think that though the republication brings down the will to that date for certain purposes, it does not alter the construction of the will's language. It does not interfere with the construction of the will in regard to the objects of gifts, and if it be necessary for the construction of the will to refer to the date of the execution of the will, that date is still a factor for determining the construction. The codicil may make the will speak as of 1855, but wherever it be necessary for determining the construction of the will on its language, the date of the 30th April, 1836, must still be read into the will and codicil. I think authority and reason are in favour of that view.

The next question is whether the power has been well executed. [His Lordship stated the provisions of the settlement of the 17th January, 1848.] On that two questions were argued. First, it was contended that as £10,000 was brought in by the wife and £10,000 by the husband, each sum balanced the other, and that no fortune was paid to or settled on the daughter at all, the clause only applying to an advance designed to bring the power into operation; but "fortune" means a property or fund to be put in settlement and most appropriately dealt with on the occasion of a marriage by a settlement, and it is on marriage portions those jointuring powers are properly and usually measured. A settlement on a woman and her children is equivalent to a settlement for the benefit of the child herself. A bequest to a daughter for life, with remainder to her children, is adeemed by a gift to a daughter and her husband: *Chichester* v. *Coventry* (1); *Kirk* v. *Eddowes* (2).

The second contention is more important. In his work on Powers, p. 709, Lord St. Leonards states the general rule thus:— "It is not necessary that the portion should be paid, and actually expended by the husband, because that would put it out of his power to make a reasonable settlement of it on his family, and yet enable him to waste and squander it away. Therefore, when the portion is settled in a proper and reasonable manner for the

(1) L. R. 2 H. L. 71, 92. (2) 3 Hare, 509.

benefit of the family in the fair way of contracting, that is not within the reason of the cases on fraud and collusion." If this were a gift *simpliciter* of a fund "to settle on my daughter," the authorities cited would show this was not a settlement the Court would make. But that is not the case; it is not the case of a fund vested in the party. What is contemplated is a fortune in the case of seven named tenants for life to be provided by the intended husband or intended wife, as the case may be, and which it is also contemplated shall be the subject of settlement on such wife or husband. Children, I think, clearly come within the design of such settlement, and some benefit also to the husband or wife, as the case might be, is within it—all are within the marriage consideration, and the negotiations necessarily incident to a marriage. It is obvious that the settlement is not nominal, fraudulent, or collusive; I think the question is whether, having regard to all the circumstances there was, having regard to the position of the parties, a fortune contributed and brought into negotiation by the husband, which was by a reasonable contract under the circumstances reasonably settled. If that is so, the assent of the father, the *donor* of the power, here given, is a most important factor.

It cannot be left out of sight, I think, that Charlotte Smyth was the expectant owner for life of the Smyth estates. We must remember the husband's fortune of £10,000 was given up to the children of the marriage; what is given to the children is settled on the wife within the authorities. I think what is to be sought for in cases such as this is not a literal compliance with the words of the power, but a compliance with the interest and design of the *donor* of the power. These are, according to Lord Hardwicke, conditions to bring about prudent marriages with persons of adequate quality, and adequate fortune. *Tyrconnel* v. *Ancaster* (1) does decide that a husband settlor receives a portion from an intended wife when it is settled to increase the portions of younger children as husband and wife should appoint, and the interest meantime is given to the husband for life, and then to younger children, and, if none, to the survivor of husband and wife.

(1) 2 Ves. Sen. 499.

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The value of the case is that it excludes the idea of any hard and fast rule as to what the form of a settlement should be. Its limits are what under the circumstances was proper and reasonable and on this point I decline to differ from Richard Smyth the father of the lady and creator of the power. The appeal will be dismissed with costs.

FITZ GIBBON, L. J. :—

Upon one subordinate question I am not free from doubt, but, on the whole, I am satisfied to affirm the decision of the Master of the Rolls, upon the grounds stated by the Lord Chancellor.

Upon the question of republication, and whether the marriage of Lady Mountcashell excluded her from the power to limit a rentcharge in favour of her husband, I think that the republication of the will has the same effect as if it was made *de novo*—as if the old document, with all its words, including its date, were executed over again. We have to deal here with the old law, and the Wills Act makes a difference for some purposes, such as that of affecting subsequently acquired property. But in considering the effect of the republication, we must consider the terms of the document republished; and, on the face of this will itself, we find its date incorporated in such a way that we should make its provisions nonsense, in some particulars, if we did not still read the original date as part of the republished will. I can find no case in which the objects of a will have been held to be altered by its republication; in such a case as this, the date is, in effect, part of the description of the objects; and if we were to change the period to which the adverbs of time refer, we should in fact be doing the same thing as if we changed the names of the objects.

I take one instance. There is a provision in the will, "In case a son should be born to me *at any future time* by my said wife, my will is that *then, and in such case*, the estates hereinbefore limited should go in the first instance to *such son*, and the heirs male of his body lawfully begotten," charged with £10,000 for his daughter Charlotte Mary Smyth; and "in case *another daughter*

should be born to me by my said wife," then he directs that the lands should be charged with a sum of £10,000 for her. It would be repugnant to human nature that a son or daughter born after the will, but before the republication, should be excluded from these provisions by the fact of republication, and it is only an accident that this event did not happen. I hold that "any future time" means any time that is subsequent to the date of writing these words, namely, April 30, 1836; and you alter the will by omitting that date just as much as if you change the name of a legatee. It is said that "hereafter" is an adverb of time. Yes; but to what time does it refer? To the time fixed by the document, and that time is the original date, and is not changed by republishing the whole document, original date and all.

If necessary, I give another answer by reading the codicil which republishes the will. The will and codicil are to be read together, and the words of the codicil, in my opinion, expressly give effect to the date of the will. The testator says in effect—"I have re-edited and altered my will in some respects, but in giving my estates and property to my daughter for her life, I do so on the express condition that all the regulations, stipulations, and reservations, as mentioned in my will, shall be carried out by her and her husband, as fully as set forth in said will, and, if possible, more fully to accomplish my wishes as therein detailed." He expressly says—"My daughter Charlotte Mary having married the Hon. Charles William More"—and it is absurd to say that the stipulations, &c. mentioned in the will, which were to be carried out by her and her husband, were not to refer to the living man whom she had married, but were to apply only to some possible second husband whom she might thereafter marry.

Let us apply to some of the "stipulations" the argument that the Hon. Charles William More was not within them:—"In case my said daughter shall marry a peer . . . it shall be lawful for such husband to use the name of 'Smyth' together with his own title or name." Was the existing husband to be relieved from this obligation because the will was republished? The codicil says—"In case it may not be sufficiently understood, my wish will and desire is that whosoever or whatever person is to inherit

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my estates and property must assume the arms of 'Smyth' and take the surname of 'Smyth' also, if not to be *subject to the limitations and full intent of my last will* and wishes without equivocation in any sense soever." The one person whom it was vital to bind by "the limitations of the will" in order to give effect to its intent was the Hon. Charles More-Smyth, who, it was contended, was not affected at all, because the codicil had been executed!

My opinion is that on the construction of the original will and codicil taken together, "hereafter" and "future time" in the will continued to refer, after republication, to the same time as before, namely, to the date of the will itself, and therefore that the wife's power extended to the husband to whom she was married at the date of the codicil.

The other branch of the argument divides itself into two parts. The power of providing a rentcharge for the husband was limited to £8 per cent. of such portion as such husband should pay or settle on the testator's daughter, not exceeding £1000 a-year. The provision was a personal one, determinable on the death of the husband. In requiring the husband to "pay" or "settle" money on his daughter the testator did not forget that she was an heiress. I think his meaning was—"I do not want my daughter to charge my property with a provision for any husband who does not bring a substantial amount into the joint purse on their marriage"—I do not think that he intended to insist that the husband's contribution should be paid to the daughter in person, or settled upon her alone for her own sole and separate use. I think the condition was satisfied by bringing money into the marriage settlement to be settled on the occasion of the marriage in a fair and reasonable manner. The husband did bring in £10,000 in cash, which was made available, to a certain extent, for the purposes of the marriage settlement; and this was, in my opinion, a compliance with the condition, although the fund was not absolutely settled to the sole and separate use of the wife.

The branch of the case on which I have some hesitation is as to whether the terms on which the £10,000 were settled amounted to a settlement *on the daughter* within the meaning of the testator. But

on the whole I think it did, and I am helped to that conclusion by the fact that when he executed his codicil, and republished his will, the testator knew that the £10,000 had been brought in, and knew how it had been settled. The fact that his daughter had a large property of her own made it all the more reasonable that her interest in her husband's property should not be absolute. I think the fund was "settled" when the capital was secured to the common purse for the benefit of the children of the marriage. The husband's fund was secured for the children, and the annuity which the wife was empowered to appoint to him was only for his life. Wherever there is a provision for a husband and wife in succession, it must be in the nature of a tontine. Each has the chance of survivorship, and the settlement is none the less one on the wife, though it does not secure the whole fund to her in the event of her predeceasing her husband. The £10,000 was brought into settlement on the daughter's marriage, and I concur with the Master of the Rolls in holding that the settlement complied with the conditions of the will.

BARRY, L. J. :—

After the elaborate judgments of the Lord Chancellor and FitzGibbon, L.J., I shall do nothing more than express my concurrence with them, and for the reasons which they have given. The first proposition, which was very much pressed by Serjeant Jellett in his argument, was as to the effect of the republication of the will of 1836 by the codicil of 1855, and the proposition which he relied on is found in the head note of *Winter* v. *Winter* (1), in these words:—"The effect of the republication of the will by the codicil was the same as if the testator had at the date of the codicil made a will in the words of the will so republished." That, I think, formulates the proposition of the learned Serjeant, and that proposition is, I think, in a general way, perfectly true; but it must be considered with a regard to the facts of the particular case. The Lord Chancellor has pointed out that the facts of *Winter* v. *Winter* (1) are essentially different

(1) 5 Hare, 306.

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from the facts of this case. But to press the proposition to the extent urged by Serjeant Jellett is absolutely impossible. It would lead in case after case, and notably in the case before us, to the most incongruous conclusions. Each case must depend on its own particular circumstances, and it seems to me impossible in the present case, where there is an adverb of time in the will, pointing, for its object and operation, to the date of that will, to hold otherwise than that the republication is to operate so that the original will is to be read *with its date*. You must translate into the republishing document the date of the original will. The word "hereafter" must be construed as referring to the date of the will, namely, the 30th April 1836, and "hereafter" is to be read as "after that date," although the codicil speaks from 1855.

That being so, two other points were put by Serjeant Jellett and Mr. Kenny. The first of these two points was only argued by Serjeant Jellett, and that was that, under the settlement of 1848, though the husband brought in the sum of £10,000, still another sum of £10,000 was brought in by the lady. These two wipe each other out, and left nothing to correspond with the £10,000 to be brought in for jointuring powers and so on. Well, having regard to the terms of the settlement of 1848, and to the surrounding circumstances, I think that is an untenable proposition.

The second point was that which for some time exercised my mind, as it did also that of Fitz Gibbon, L. J. I put it to Mr. Kenny that though, within the language of Lord Hardwicke in *Tyrconnel* v. *Ancaster* (1), the settlement of 1848 was fair and reasonable, it might not be a settlement of the £10,000 on the daughter so as to be a compliance with the condition imposed by the testator. On the whole, however, I concur with the Lord Chancellor and my brother Fitz Gibbon in thinking that the settlement of the £10,000 was a sufficient compliance with the condition, and it is most satisfactory to my mind that it was obviously the intention and understanding of the testator when he republished his will, as well as of all the other parties

(1) 2 Ves. Sen. 499.

interested, that it was such a compliance. I think that the decision of the Master of the Rolls ought to be affirmed.

Solicitor for the plaintiff: *W. F. St. Leger.*
Solicitors for the defendant: *W. Bass & Co.*

R. D. M.

M. R.
1895.
March 23, 25.

In re ROYAL MARINE HOTEL COMPANY, KINGSTOWN (LIMITED).

(1894. No. 348.)

Company—Bill of Sale—Non-renewal of Registration—Bill of Sale (Ireland) Act, 1879 (42 & 43 *Vict. c.* 50, *ss.* 8, 11)—*Bills of Sale (Ireland) Act*, 1879, *Amendment Act*, 1883 (46 *Vict. c.* 7, *s.* 17)—*Description of chattels by reference to schedule.*

A hotel company (limited) executed a bill of sale in the year 1873 to creditors, who were also mortgagees of the hotel premises, of all the furniture and effects "which now are or hereafter shall be in the hotel, and which effects now on the premises are set forth in the schedule hereto." By mistake certain effects then upon the premises were omitted from the schedule. The bill of sale was registered, but was not re-registered after the passing of the Bills of Sale (Ireland) Act, 1879, pursuant to the provisions thereof.

In the year 1894, an order having been made to wind up the Company, the hotel premises and the furniture and effects therein were sold, and a portion of the purchase-money set apart as the value of the furniture, which consisted partly of the furniture in the hotel at the date of the bill of sale, and partly of furniture subsequently purchased.

A summons was taken out by the liquidator to obtain the opinion of the Court:—1. Whether the bill of sale was valid through not re-registered? and, 2. What property passed under it?

Held, 1, That the bill of sale being a security given by a limited Company was not within the Bills of Sale Acts; and 2, That it passed all the furniture in the hotel, and not merely that which was described in the schedule.

Summons.

This was an application by George Edward Thompson, the liquidator of the Royal Marine Hotel Company, Kingstown (Limited), to take the opinion of the Court as to the effect and validity of an indenture, dated June 12th, 1873, made between the Company of the one part, and George Woods Maunsell and Alfred Mac Dermott of the other part, and purporting to assign the hotel furniture as specified in the first schedule thereto to the said George Woods Maunsell and Alfred Mac Dermott as additional security for two sums of £8000 and £7000 therein men-

tioned, and to take directions as to the mode in which the sum of £1800, being the portion of the purchase-money of the said hotel premises and furniture set apart as the value of the furniture now in and upon the said hotel premises, should be distributed.

The Company was incorporated under the Companies' Acts in July, 1863.

The indenture of June 12th, 1873, above-mentioned, recited that the Company was indebted to the persons mentioned in the second and third schedules thereto in the sums set opposite to their names, amounting in all to £8000 and £7000 respectively, and that the Company had agreed to secure repayment of the said sums together with interest at the rate of 6 per cent. per annum by mortgages of certain property belonging to the Company, and also by an assignment or bill of sale to the said George Woods Maunsell and Alfred Mac Dermott (thereinafter called the mortgagees), in trust for the persons mentioned in the said second and third schedules, of the goods and chattels, furniture and effects mentioned in the first schedule thereto. The deed further recited that the Company had by several deeds, dated May 22nd, 1873, demised the premises therein mentioned (namely the hotel premises) to the said persons by way of mortgage to secure the said sums of £8000 and £7000. The deed then witnessed that in pursuance of the said agreement, and in consideration of the said sums of £8000 and £7000 so due as aforesaid, the Company bargained and sold to the said mortgagees "all and singular the furniture, works of art, plate, plated articles, linen, glass, china, books, and household effects, and articles of use and ornament, which now are or hereafter shall be in or about the messuage and premises known as the Royal Marine Hotel, Kingstown (Limited), in the county of Dublin, and which property, goods, and effects now on the said premises are set forth in the first schedule hereto annexed, and all the estate, right, title, interest, property, claim, and demand whatsoever both at law and in equity of them the said mortgagors of, in, or to the same respectively, to hold unto the said mortgagees, their executors, administrators, and assigns, subject to the proviso for redemption hereinafter contained." Then followed covenants to pay the £8000 and £7000, not to remove the property assigned without the consent of the mortgagees, save if any

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articles required repair or were worn out, and then to replace such worn out articles with others of equal value. A power of sale was also given and the proceeds of the sale were to be applied in payment first of the £8000 and then of the £7000 amongst the persons named in the second and third schedules respectively, according to the amounts set opposite their names. One of the mortgagees, George Woods Maunsell, was returned in the said schedules as a creditor to the extent of £1750.

This bill of sale was registered under the Bills of Sale (Ireland) Act, 1854, but was never re-registered as provided by the Bills of Sale (Ireland) Act, 1879, which superseded the Act of 1854. As a matter of fact there were in the hotel at the date of the execution of the bill of sale several articles of furniture which were not mentioned in the first schedule, and several articles were purchased from time to time. In June, 1894, an order to wind up the Company was made by the Master of the Rolls on the petition of the executors of Thomas Vance, who had advanced moneys to the Company, and was returned in the second and third schedules to the bill of sale as a creditor. The hotel was subsequently sold as a going concern for £11,500, and out of this a sum of £1800 was agreed on as the value of the furniture then in the hotel, and was lodged in Court to abide the order of the Court. Separate valuations were made of the property on the premises corresponding to the articles described in the schedule to the bill of sale and of the other articles on the premises at the date of the bill of sale, but which had been omitted from the schedule, and also of the after-acquired property.

The creditors whose debts were secured by the mortgages of 22nd May, 1873, and by the bill of sale, claimed the proceeds of the whole of the furniture, which claim was resisted by the unsecured creditors, firstly, on the ground that the bill of sale not having been re-registered was void as against the liquidator; and, secondly, that in any case the furniture which was on the premises at the date of the bill of sale, but was omitted from the schedule thereto, did not pass. The liquidator accordingly took out the above-mentioned summons, the hearing of which was adjourned into Court.

A. F. Blood, for the liquidator.

Frederick Fleming, for unsecured creditors :—

As to the first point, the deed of June 12, 1873, was a bill of sale, and should have been re-registered under the Act of 1879, section 2, which applied to bills of sale executed before that Act as well as after it. It was not registered as a mortgage under section 43 of the Companies' Act, 1862, but even if it had been so registered, no person except a member or a creditor of the Company could have inspected the register directed to be kept by that section. Non-registration under the Companies' Act does not make the mortgage void : *Wright* v. *Horton* (1). It is submitted that not having been registered the bill of sale is void under section 8 of the Act of 1879, which makes an unregistered bill of sale void as against "all trustees or assignees of the estate of the person whose chattels are comprised in such bill of sale under the law relating to bankruptcy, arrangement with creditors, or liquidation," as liquidation includes liquidation under the winding-up Acts. It is clear that a limited Company can give a bill of sale : *Shears* v. *Jacob* (2) ; *Altenborough's Case* (3). The other side will rely on *Re Marine Mansions' Company* (4), which decided that the non-registration of debentures given by a Company under the Bills of Sale Act, 1854, did not render them void against the liquidator in a voluntary winding up, but the judgment of the Court is there pointed at the words of the Act of 1854, which differ from those of the Act of 1879. A bill of sale given by a limited Company is not within the Bills of Sale Act, 1882 : *Re Standard Manufacturing Company* (5) ; but there are are no exempting words in the Act of 1879, as in section 17 of the Act of 1882, and that was a case of debentures. *Read* v. *Joannon* (6) decides that a debenture of an incorporated Company is not a bill of sale within the Acts. *Edmonds* v. *Blaine Furnaces Company* (7) is to the same effect. But here the deed is called and treated as a bill of sale.

On the second point, it is not disputed that after-acquired

(1) 12 App. Cas. 371.
(2) L. R. 1 C. P. 513.
(3) 28 Ch. D. 682.
(4) L. R. 4 Eq. 601.
(5) [1891] 1 Ch. 627.
(6) 25 Q. B. D. 300.
(7) 36 Ch. D. 215.

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property was properly included in the bill of sale: *Holroyd* v. *Marshall* (1), followed in *Tailby* v. *Official Receiver* (2); but it is submitted that the words of the bill of sale are restrictive, and extend only to the articles in the schedule and not to the other articles then on the premises, but not mentioned in the schedule, and which continued there till the date of the sale.

William Kenny, Q.C., and *Ignatius O'Brien*, for the petitioning creditors:—

As to the first point, it is clear that the deed, which it is admitted is a bill of sale, is not void for want of registration under the Bills of Sale Act, 1879. Even if it should have been registered under that Act it is not void in the event of the liquidation of the Company, as the expression "or liquidation" in section 8 of that Act, which is taken from section 8 of the English Act of 1878, refers to "liquidation by arrangement," a term introduced by the English Bankruptcy Act of 1869: *Re Asphaltic Wood Pavement Company* (3). Further, the case of *Re Standard Manufacturing Company* (4) decides that any mortgage security given by a limited Company does not fall within the Bills of Sale Acts at all.

As to the second point, it is submitted that all the property in the hotel at the time the bill of sale was executed passed by it, and not merely the property mentioned in the schedule. The recitals show that the intention was that the mortgages and the bill of sale were to be executed on the same day, and that all the property of the Company, present and future, was to be charged. The operative words carry out this intention, and are not to be restricted by the reference to the schedule. It is a case of *falsa demonstratio*. *Baker* v. *Richardson* (5) supports this view. *Morrell* v. *Fisher* (6), and *Wood* v. *Rowcliffe* (7), where the schedule was held to control the deed, are in conflict with *Baker* v. *Richardson* (5), unless they are distinguishable by the different words used; the

(1) 10 H. L. C. 191.
(2) 13 App. Cas. 523.
(3) 49 L. T. (N. S.) 159.
(4) [1891] 1 Ch. 627.
(5) 6 W. R. 663.
(6) 4 Ex. 591.
(7) 6 Ex. 407.

word "which" is omitted in *Wood* v. *Rowcliffe* (1). *Nightingale* v. *Wood* (2); *Re Craig* (3); *Roe* v. *Lidwell* (4); Green on Bills of Sale, p. 231, note.

Houston, Q.C., for Alfred Mac Dermott, the surviving trustee of the deed of June 12, 1873, argued to the same effect.

Frederick Fleming, in reply :—

As to the first point, *Re Standard Manufacturing Company* (5) is no doubt against my contention; but it is a startling decision, that though a person intending to give credit to a limited Company cannot inspect the register of mortgages to be kept under section 43 of the Companies Act, 1862, the existence of that section shows that a mortgage given by a limited Company is not within the Bills of Sale Acts. The word "liquidation" in the Act of 1879 may well refer to a winding-up of a Company.

As to the second point, the recital as to the schedule is not in favour of the contention of the other side. The actual words of the deed should prevail, though as regards the intention of the parties it is difficult to suggest why any property that was in the hotel at the time should have been left out. The leading case on the subject is *Morrell* v. *Fisher* (6), which is in favour of my construction. It was followed in *Wood* v. *Rowcliffe* (1), which was a well considered decision, though the judgment is short. *Baker* v. *Richardson* (7) is not a satisfactory case. *Nightingale* v. *Wood* (2) cannot lay down any different principle from *Morrell* v. *Fisher* (6). Nothing can turn on the omission of the word "which."

March 28

THE MASTER OF THE ROLLS :—

The question in this case is as to the validity and scope and effect of the bill of sale, dated the 12th June, 1873, made between the Company of the one part, and George Woods Maunsell and Alfred MacDermott of the other part. I call it a bill of

(1) 6 Ex. 407.
(2) 1 Ex. 879.
(3) Ir. R. 4 Eq. 158.
(4) 11 Ir. C. L. R. 320.
(5) [1891] 1 Ch. 627.
(6) 4 Ex. 591.
(7) 6 W. R. 663.

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sale, for it undoubtedly is one, and was registered as such pursuant to the provisions of the Bills of Sale (Ireland) Act, 1854, which was the statute regulating bills of sale at the time this deed was executed. In the year 1879 a new Bills of Sale Act was passed for Ireland, superseding the earlier Act, and requiring all bills of sale, whether executed before or after the passing of the Act, to be re-registered in manner prescribed by section 11. This bill of sale, however, was not re-registered after the passing of that Act, nor has it been re-registered since.

The first question is—this deed being in form and in substance a bill of sale—what was the effect of its not being re-registered? It was argued that, as it had not been re-registered by virtue of the provisions of section 11, the original registration became void, that is to say in the events mentioned in section 8. That section provides that every bill of sale to which the Act applies shall be registered under that Act, otherwise it shall be deemed fraudulent and void as against (amongst others) "all trustees or assignees of the estate of the person whose chattels are comprised in such bill of sale, under the law relating to bankruptcy, arrangement with creditors, *or liquidation*"; and it was contended that the word "liquidation" referred to the winding-up of a Company under the Companies Acts, and that therefore the bill of sale was void as against the liquidator, as assignee of the estate of the Company in the winding-up.

Apart from authority, it would be difficult to hold that the word "liquidation" (which is not a statutory expression) here applies to the winding-up of a Company, and that the section must be read as if the bill of sale was to be void as against the liquidator of a Company being wound up. It is far more natural to suppose that the word "liquidation" got into the section by the mistake of the draftsman, who adopted section 8 of the English Act of 1878 without considering that there was no proceeding by way of liquidation in Ireland corresponding to liquidation by arrangement under the English Bankruptcy Act of 1869. However, it was decided by Bacon, V. C., in *Re Asphaltic Wood Pavement Company* (1), that the word "liquidation" in section 8

(1) 49 L. T. (N.S.) 159.

of the English Act of 1878 did not apply to liquidation in a winding-up of a Company, but referred to liquidation in bankruptcy; and I am asked, because of a slight difference in the wording of the Irish Act, to hold that this bill of sale is void in this winding-up. I am of opinion that the word "liquidation" in this context does not apply to the winding-up of a Company, and even if I were of the contrary opinion, I should feel myself bound by the decision on the subject, and the earlier case of *Re Marine Mansions' Company* (1), cited in the argument. There is therefore no statutory provision under which this bill of sale could be held to be void. The case of *In Re Standard Manufacturing Company* (2) goes a great deal further. It was there decided by the Court of Appeal that a debenture charging the chattels of a limited Company was not void as against execution creditors because it was not registered under the Bills of Sale Acts, on the ground that under the Companies Act of 1862 a Company is bound to keep a register of its mortgages and charges, and that the debenture should have been placed upon such register, and that the Legislature having enacted this particular provision for registering charges given by a Company on its property, impliedly relieved a Company from registering such charges under the Bills of Sale Acts. I agree with Mr. Fleming that this may be a far-reaching decision, but I am bound by it. It is unnecessary to express an opinion whether, if a mortgage given by a Company includes lands, registration under the Companies Act would be sufficient without registration under the Irish Registry Acts. That question does not arise here. Mr. Fleming's contention has much force in it, that the provision in the Companies Act for registering the mortgages of a Company is futile, because a person intending to give credit to a Company has no power, or at least no right, to inspect the register. But I could not set up my own opinion, even if I agreed with Mr. Fleming, against the opinion of the Court of Appeal. I am therefore of opinion that the deed of 1873 is not invalid by reason of its not having been re-registered under the Act of 1879.

The next question is, what is the operation and effect of the

(1) L. R. 4 Eq. 601. (2) [1891] 1 Ch. 627.

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deed? It would be hopeless to expect to find any authority exactly in point, as the question depends on the special words of the deed. It purports to be made between the Hotel Company of the one part, and George Woods Maunsell and Alfred MacDermott, thereinafter called the mortgagees, of the other part. It recites that the Company is indebted to the persons mentioned in the second and third schedules in the sums set opposite their names, amounting in all to £8000 and £7000, and that the Company has agreed to secure repayment of these sums by mortgages of certain property of the Company, and also by an assignment or bill of sale to the said mortgagees in trust for the persons in the said second and third schedules named, of the goods, chattels, furniture, and effects mentioned in the first schedule thereunder written for better securing the payment thereof as thereinafter expressed. It then recites the execution, on the 22nd May previous, to the several persons named in the said first and second schedules, of mortgages by way of demise of the property therein mentioned, to carry out the above agreement. Then comes the operative part, by which the Company bargains and sells to the mortgagees "all and singular the works of art, plate, plated articles, linen, glass, china, books, and household effects, and articles of use and ornament, which now are or hereafter shall be in or about the messuage and premises known as the Royal Marine Hotel, Kingstown, Limited, in the County of Dublin, and which property, goods, and effects now on the said premises, are set forth in the first schedule hereto annexed, and all the estate right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of them the said mortgagors, of, in, or to the same respectively."

On the face of the deed the assignment appears to be a complete and perfect transaction. The words are, "which now are or hereafter shall be." There is no ambiguity as to what is assigned on the face of the deed. There is, however, a latent ambiguity, for I am satisfied by the affidavit of Mr. Thompson, who was the secretary of the Company prior to 1873, that there was property on the premises at the date of the deed which was not mentioned in the schedule, and which is still on the premises, and is now claimed by the mortgagees, in addition to the property in the

schedule and the after-acquired property. On the other hand, the liquidator and the unsecured creditors say that it is only the property mentioned in the schedule, or any property afterwards substituted for it or in addition to it, which passes under the deed, and not the articles which were there at the time, but were not scheduled.

On the one side the contention is that it is a case of *falsa demonstratio*, and that the words of description can be separated from the preceding words without doing violence to the context, that is to say, the words "all . . . which now are in or about the premises," are complete in themselves, and that the words beginning with "and which," are mere words of description and unimportant. On the other side it is argued that the general words are governed and restricted by the subsequent words, which are words of definition and not of description merely. The principles contended for on either side are clear; the question is, which principle is to be applied to this particular case.

Morrell v. *Fisher* (1) and *Wood* v. *Rowcliffe* (2) were relied on by Mr. Fleming. The principles I have mentioned are laid down in the former case, which was followed in *Wood* v. *Rowcliffe* (2). In that case, decided in 1851, the Court of Exchequer said that the question was in reality decided by *Morrell* v. *Fisher* (1); that the case before the Court was not a case of *falsa demonstratio*, but that the operative words of the bill of sale were restricted by what followed, so that nothing passed except what was specified in the inventory. The words of the bill of sale there were: "All the household goods and furniture, of every kind and description whatsoever, in the said house, No. 2, Meadow-place, more particularly mentioned and set forth in an inventory or schedule of even date herewith, and given up to the said George Rowcliffe on the execution hereof." It is to be observed that there is no break in that sentence; it runs on continuously to the end. Though it might have been read as if divided into two, the Court did not so read it, and it appears to me that it was owing to the peculiar grammatical construction of the sentence that the Court arrived at the conclusion that it was not a case of *falsa demonstratio*.

(1) 4 Ex. 591.
(2) 6 Ex. 407.

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In *Baker* v. *Richardson* (1), decided by the Court of Queen's Bench in 1858, the bill of sale professed to pass all the property in the bankrupt's house, adding, "which are more particularly described in the schedule." It was there held that these words did not cut down the preceding words, which showed that the debtor intended to pass the whole of the furniture in the house, and that he did not intend to restrict the effect of the deed to the articles only named in the schedule. In other words (as stated by Crompton, J.), that the schedule was merely a *falsa demonstratio*, the object of which was to point out the articles more particularly, but not to restrain the words in the deed to the articles enumerated.

Applying this decision to the present case, the words here are a full and complete description of the furniture in the hotel at the time, without calling in aid the subsequent words referring to the the schedule, which is inaccurate and untrue as matter of fact. Perhaps the schedule was prepared too soon, or without sufficient care. Anyhow, it appears that a good many articles were left out. In my opinion it is a case of *falsa demonstratio*, and the mortgagees are entitled to rely on the general words in the deed. Mr. O'Brien says that it was intended that the schedule should contain a complete list of all the articles in the hotel, and that that explains the recital as to the schedule; but, on the other hand, it may well be that the recitals in the deed were not carefully prepared, as there is no reference in them to the agreement to assign after-acquired property. If operative words are ambiguous, a recital can be looked at to explain them, but if operative words are clear, they cannot be governed by the recital. Therefore we have here a good specific and distinct conveyance of all the property in the hotel, with a description superadded which is incomplete. It cannot be lost sight of that it is a question of intention, to be ascertained from the words of the deed. There is an assignment of after-acquired property as well, which *Holroyd* v. *Marshall* (2) shows is perfectly good. Can it be said that when they scheduled knives, forks, spoons, &c., and assigned all after-acquired property as well, they intended to leave anything

(1) 6 W. R. 663. (2) 10 H. L. Cas. 211.

out? Did the Company intend to leave out, *e.g.* a table and chair which were in the hotel at the time, but were omitted from the schedule, while yet any table or chair which was afterwards purchased should be subject to the trusts of the deed? I am clearly of opinion that the deed is a valid deed, and that it operates to pass all the property of the kind mentioned in the hotel at the time or afterwards.

Solicitors for the liquidator: *D. & T. Fitzgerald.*
Solicitors for unsecured creditors: *Casey & Clay.*
Solicitor for the mortgagees: *G. H. Lyster.*
Solicitors for the petitioning creditors: *J. L. Scallan & Co.*

W. L.

DAVIS *v.* ADAIR (1).

Appeal. 1894. Nov. 19, 26, 27–30. 1895. Feb. 14.

(1893. No. 67.)

Domicil—Change of domicil of origin—Permanence of residence—Declaration of intention.

The domicil of origin will be presumed to continue until a new one is acquired. To effect a change for such a purpose there must not only be a change of residence but an intention to abandon the former domicil and acquire another. Long continued residence is strong evidence of intent to change the domicil, but alone and unaccompanied by the intent, will not effect the change. The question is, in all cases, a question of fact to be determined by the particular circumstances of each case.

Under the will of her husband E. C. D., the plaintiff was entitled to the income of the residue of his property for her life so long as she continued unmarried. The plaintiff was born in London of English parents in 1835, and went with her parents to America, when she was three years old. In 1858 she married E. C. D. who was born in Dublin of British parents, and who had gone to America in his infancy. At the date of the marriage he was a wine and spirit merchant in New York in partnership with his father. In 1858 the partnership was dissolved, and the father in 1859 returned to Dublin, where he took a lease of some property and built some houses. E. C. D. returned to Dublin in 1864 with his wife, and lived there till his death in 1871. The

(1) Before WALKER, C., SIR PETER O'BRIEN, C.J., PALLES, C.B., and BARRY, L.J.

Appeal. 1894.

DAVIS *v.* ADAIR.

plaintiff continued to reside in Dublin with her mother-in-law until the death of the latter in 1881, and for a year afterwards. The plaintiff then travelled for about five years, and had not any fixed abode. In 1887 she went to reside in the house of M. in New York, who had married her sister and was a widower, and she resided there for four years until the last of his daughters was married in 1891.

M. was born in London in 1827 of English parents. In 1852 he went to New York as agent for his father's business, that of a merchant in London; he visited England every year. In 1858 he married a sister of the plaintiff. He purchased a house and some land in Staten Island near New York, and he afterwards added to it by further purchases; he also bought a fishing in Canada, where he went every year. He refused to become a naturalized citizen of the United States, and he frequently expressed the intention of returning to England as soon as he had made his fortune. His wife died in London in 1884. In 1888 he retired from business, and sold most of his property in America; and on the 24th June, 1891, he married the plaintiff in New York, where a marriage with a deceased wife's sister is lawful. In 1892 he bought a property in the county of Surrey:—

Held, (affirming the decision of Porter M.R.), that the plaintiff and M. were both on the 24th June, 1891, domiciled Americans, and that the marriage was a valid marriage.

By his will, dated the 1st December, 1868, Edward Campbell Davis, bequeathed all the residue of his personal estate to S. N. Lane, and G. Sykes (whom he appointed trustees and executors), upon trust for conversion, and the testator directed that the trustees should stand possessed of one moiety of the residue upon trust for his wife, Emily Davis, or her assigns, "so long as she should live his widow and unmarried," and "after her decease or future marriage" upon the trusts thereinafter declared; and as to the other moiety for his cousin Charles Joseph Howard, for life; and subject as aforesaid, as to all his residuary personal estate, in trust for the children of the said C. J. Howard as he should appoint; and in default of appointment, amongst such children equally; but in case there should be no person who should become entitled to his residuary personal estate under the aforesaid trusts (an event which happened), the testator bequeathed the same to the Governors of the King's Hospital, Oxmantown. The testator further directed that in case the said Charles Joseph Howard should predecease the testator's wife without leaving issue who should be entitled to his residuary estate under

the trusts aforesaid (an event which happened), the moiety of the income of the residuary personalty given to C. J. Howard should be paid to the testator's wife, "while she continued his widow and unmarried and no longer."

The testator died on the 1st January, 1871; C. J. Howard died on the 19th September, 1870, a bachelor; S. N. Lane died on the 1st February, 1878; and G. Sykes, being desirous of being discharged from the trusts of the will, by indenture dated the 8th April, 1884, S. F. Adair and R. O. Armstrong were appointed trustees of the will in his stead.

On the 24th June, 1891, Mrs. Emily Davis married her brother-in-law, James M'Andrew, at Middletown, in the State of New York, they being as they alleged both British subjects, and since then Adair and Armstrong refused to pay the income of the residuary personal estate to Mrs. M'Andrew. The action was brought by Emily Davis against them and the Governors of the King's Hospital for a declaration that she was entitled to it. The Governors of King's Hospital, by their defence, pleaded that the marriage was a valid marriage, and they denied that M'Andrew and Mrs. Davis were British subjects.

The plaintiff, whose maiden name was Emily Cuthbertson, was born of English parents in London, in 1835. When she was three years old, her parents and their family went to reside in New York, where her father acquired a residence on Staten Island; he had a business in New York, brought up and educated his children there, and lived and died there. In 1858 she married Edward Campbell Davis. He was born in 1835, in Swift's Hospital, in Dublin, where his uncle was a resident physician. John J. Davis, his father, had gone to America shortly before E. C. Davis was born, and his wife and child went out to him in 1835. John J. Davis, who had obtained an order of naturalization as an American citizen dated the 5th April, 1844, carried on the business of a wine and spirit merchant in New York, at first by himself and afterwards in partnership with his son, Edward Campbell Davis. On the 29th June, 1858, he dissolved partnership, and in 1859 he returned to Dublin. He took a lease of some property in Rathmines, in the county of Dublin, where he built a number of houses, and he died on the 7th February, 1864.

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On the 30th June, 1858, Edward Campbell Davis formed a new partnership to carry on the business, and he continued to carry it on till he returned to Ireland with his wife in 1864. On the 15th June, 1864, he filed a cause petition in the Court of Chancery in Ireland to administer the assets of his father, whom he described as domiciled in Dublin; legacy duty was paid on his assets. E. C. Davis died at Rathmines, a suburb of Dublin, in 1871, and after his death, his widow (the plaintiff) lived at Rathmines with her mother-in-law, Mrs. Anne Davis, till the death of the latter on the 22nd April, 1881. After that date the plaintiff lived in Dublin for a year, when she sold off all the chattel property, and then she travelled about for some time, paying visits to her mother and sister. In 1884 she was at Geneva with a sister, and in May, 1884, she was with her sister, Mrs. M'Andrew, in London, who died there. In 1885 she paid a visit to James M'Andrew in New York, who had been married to her sister, and who was then a widower. From 1887 till 1891 she resided with James M'Andrew, and kept house for him. He had three daughters, one of whom died, another married a resident in New York, and the third married a resident in London early in 1891. After that the plaintiff left New York and came to Dublin, where she entered into negotiations with the Governors of the King's Hospital, for the purpose of selling to them the life estate devised to her by the will of her husband, but after some correspondence this endeavour failed. She then returned to New York, in June, 1891, when James M'Andrew, who had been in Canada, came down to New York, and on the 24th June a marriage was celebrated between them according to the form of the Protestant Episcopal Church.

James M'Andrew was born in Camberwell, London, in 1827. In 1852 he went to America and settled in New York as an agent for his father's business, a London firm. In 1858 he married Julia Cuthbertson, a sister of the plaintiff's. Between 1852 and 1858 he frequently crossed to England and spent a month or two, on a visit, and also after his marriage he followed the same practice, and visited England every year. His wife died in 1884, in London. He purchased a house and some fee-simple lands on Staten Island about six miles from New York, and he

added to these by buying up adjoining land. He rented a factory in New Jersey, where he carried on the manufacture of emery; he also traded largely in liquorice paste. He bought a shooting and fishing in Canada, where he went for recreation every year: he had expended between £15,000 and £20,000 in the purchase of fee-simple property in the States. He finally retired from business in 1888, and sold his business premises except the emery factory. His daughters were born and educated at his residence in Staten Island, some of them were married there, and one died and was buried in New York. He had refused to become a naturalized citizen of the United States, although pressed to do so at the time of the Civil War; and he had obtained in 1876 a private Act of the Senate of the State of New York to enable him to hold freehold property in America, a proceeding which was necessary only in the case of a foreigner. Since his second marriage he had bought a property in England for £20,000 and had brought over his property and stored it till his new house was ready. James M'Andrew in his evidence stated that his intention always was to return to England, and evidence was given by a number of witnesses, who were friends of his, Samuel Wann, William Nichols, the Rev. Dr. Eccleston, and William Watson, that he had always expressed the intention of returning to England to live there permanently in the end, and had always in his conversations expressed the opinions of a very staunch Englishman. But in these conversations he had not fixed any definite time for returning, and simply said he would do so when he had made his fortune, or that he would end his days in England.

On the 2nd June, 1894, Porter, M.R., delivered judgment as follows, dismissing the action with costs.

THE MASTER OF THE ROLLS:—

The plaintiff who sues as Emily Davis claims to be entitled to receive during her life or widowhood the income of the residuary estate of the late Edward Campbell Davis to whom she was married on the 10th January, 1858. He died on the 1st January, 1871, having made a will (duly proved), dated 1st December, 1868, whereby he directed that his trustees or trustee for the time

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being should stand possessed of all the residue of the trust funds arising from sale of his personal estate or otherwise, and of all his other personal estate, and of the funds and securities upon which, from time to time, the same might be invested, and which the testator declared were thereinafter referred to as his residuary personal estate, upon trust, as to one moiety of the annual interest, dividends, and profits of his residuary personal estate, to pay the same unto his wife, the plaintiff, or her assigns, so long as she should live his widow and unmarried; and, after her decease or future marriage, which should first happen, upon the trusts thereinafter declared respecting his residuary personal estate; and as to the remaining moiety of the annual interest, dividends, and profits of his residuary personal estate, upon trust, to pay the same unto his first cousin Charles Joseph Howard, and his assigns, during his life, with power to the said Charles Joseph Howard to appoint the whole, or any portion of the said dividends, or other income, to his widow surviving him, for her life; and, subject as aforesaid, the testator declared that his trustees or trustee should hold the whole of his residuary personal estate in trust for the children of the said Charles Joseph Heward, as the said Charles Joseph Howard should, as therein mentioned, appoint, and, in default of appointment, in trust for the children of the said Charles Joseph Howard, in equal shares, as therein mentioned; but in case there should be no person who should become entitled to his residuary personal estate under the trusts last aforesaid, then, subject to the several life estates thereby given in the income of his residuary personal estate, the testator bequeathed all the same personal estate unto the Governors for the time being of the King's Hospital, Oxmantown, commonly called the Blue Coat Hospital, in the city of Dublin (being the defendants in the present action), for the benefit of that institution, with certain ulterior trusts which are not material. And the testator thereby directed that in case the said Charles Joseph Howard should predecease his said wife, without leaving issue who should be or become entitled to his residuary personal estate under the trusts aforesaid, the moiety of the income of his residuary personal estate given by his said will to the said Charles Joseph Howard should be paid to his said wife whilst she continued his widow and

unmarried, and no longer. Charles Joseph Howard died unmarried on the 19th September, 1870 (in the lifetime of the testator), and thereupon the plaintiff became entitled after her husband's death to the entire income of the residuary estate, and, in fact, received and enjoyed it from 1871 down to a recent date, when she went through a ceremony of marriage with James M'Andrew who is still living, and was examined at the hearing. Since this ceremony the plaintiff has always lived with James M'Andrew as his wife, and continues to do so. If she is his wife, that is, if the marriage was a legal one, the gift in favour of the Blue Coat Hospital has taken effect, and the plaintiff must fail. On the other hand, she contends that the marriage was illegal and invalid; that she is not the wife of Mr. M'Andrew, but is still the widow of Edward Campbell Davis; and that the gift over has not taken effect.

Obviously, the trustees, who had notice of this marriage ceremony of 24th June, 1891, and who indeed were expressly informed of it by the plaintiff herself, and by her given to understand that she had by reason of it forfeited all further benefits under the testator's will, could not take upon themselves to decide as to its validity. They have therefore properly retained the income till the decision of this case, and all proper parties are before the Court, including the Governing Body of the Blue Coat Hospital.

It thus appears that there is one question, and one only for determination, viz. Was the marriage of the 24th June, 1891, between the plaintiff Emily Davis and James M'Andrew valid, or not?

But, though the question is simple as thus stated, it is in reality a difficult one, depending for its solution upon a number of mixed questions of law and fact involving considerations of much delicacy.

In the first place, James M'Andrew was at the time of his marriage to the plaintiff (I call it marriage for convenience, not at present deciding as to its validity) a widower; and his first wife had been a sister of the plaintiff, to whom he was legally married on the same day on which the plaintiff was married to her husband, Edward Campbell Davis. Of course such a marriage, namely, that with a deceased wife's sister, is, since Lyndhurst's Act, invalid; not

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merely voidable, but void, in the case of persons domiciled in the United Kingdom; and the plaintiff says that both she and James M'Andrew were so domiciled on the 24th June, 1891. It would, however, be sufficient for her to show that one or other of them had a British or Irish domicil at that time; for a marriage cannot be valid if it is invalid as to one of the contracting parties, else one would be married and the other not, an obvious impossibility. The question then comes to be one of domicil; for the marriage of 1891 was contracted in the State of New York, where it is proved (and indeed it is not denied) that such a marriage, if otherwise unimpeachable, is legal and binding, irrespective of any question of domicil, and by our law the validity of a marriage depends upon the *lex domicilii*. The validity of the marriage must be tested by the *lex domicilii*, since the words of the testator's will are to be construed in our Courts as referring to a marriage valid under our laws, that is by the *lex domicilii*. This point is now too clear for argument: *Chapman* v. *Bradley* (1). Assuming the marriage to be valid under the law of the State of New York, if it is invalid here the plaintiff is a widow and not a married woman for the purposes of this case. It is no doubt a singular and unattractive feature of the plaintiff's case that she should come into Court endeavouring to prove that she is living in what our law regards as an incestuous relation with Mr. M'Andrew, after having gone through a *prima facie* regular marriage with him in *facie ecclesiæ*, as she did. But after all that is her own affair. It is well known that a marriage with a deceased wife's sister is not invalid by the canon law, nor by the municipal law of any considerable country in the world except our own. There is no question of consanguinity between the parties. In nearly all our own colonies, if not all, such a connexion is quite regular. Many persons in this country have contracted such marriages, knowing that they are not legally valid, but considering that they are not violating any moral obligation in so doing. To press the argument, as it was pressed before me, almost to the extent of a sort of *estoppel*, which ought to prevent the plaintiff from making such a case in a Court of law, is to go further than there is any legal ground for; and the

(1) 4 De G. J. & S. 71.

Governors of the Blue Coat Hospital have no right to require of the plaintiff the observance of a code of moral obligation, or a sensitiveness of personal feeling, more delicate than she feels called upon to adopt. There is another view which I confess presents her case to my mind in a more unpleasant aspect than that; namely, that her present action is brought for the purpose of obtaining the money of Edward Campbell Davis in spite of her having deliberately and intentionally violated, so far as she could, what she knows to have been the only condition on which he left it to her. That, however, is also her own affair. Whatever the law gives her she is at liberty to claim; and the question is, whether she has, or has not, contracted a valid marriage; and that depends not on her intentions, or wishes, or feelings, but solely on the question of domicil. In the facts which have been proved this is narrowed down to a selection between two domicils, viz.:—British (using that term as including Irish) and American, meaning thereby that of the State of New York; and may be thus stated:—Was the domicil of the plaintiff and of James M'Andrew on the 24th June, 1891, or of one of them, British?

If the answer to this question is in the affirmative as to both or either, the plaintiff succeeds. If it be in the negative as to both, she fails.

I now come to the facts, as to most of which there is hardly any controversy.

The plaintiff's maiden name was Emily Cuthbertson. She was born of English parents in London, in or about the year 1835. Her domicil of origin was therefore British. When she was some three years old her father and mother, William David and Julia Cuthbertson, and their family, including the plaintiff, went to reside in the State of New York; and there is no doubt that William David Cuthbertson acquired an American domicil at that time, or shortly after. He does not seem to have become a naturalised American citizen (though of course that is not the question); but he acquired a fixed and permanent residence on Staten Island, had his business in New York, brought up and educated his children (of whom there were several) there, had all his business relations and interests in New York, and lived and died there. There can be no question that his domicil was

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changed from England to America. The plaintiff lived with him till after she came of age; and as an infant's domicil is that of its father, her domicil in 1856 was also American, though her domicil of origin was English. And this state of affairs remained till her marriage with Edward Campbell Davis in 1858, when of course his domicil, whatever it was, became hers.

Edward Campbell Davis was about her own age, having been born in Dublin in 1835 of Irish parents. His father, John Joseph Davis, emigrated to America shortly before his son's birth, and was followed there by his wife and infant son. I shall assume, though it is not certain, that the domicil of John Joseph Davis had not been altered, but remained Irish when Edward Campbell Davis was born. But it was undoubtedly altered to an American one soon after. He became an American citizen; lived and settled in America; had his business there, in partnership with William David Cuthbertson, and afterwards with him and his own son Edward Campbell Davis; travelled in Europe as an American in 1859, under an American passport, which was *viséd* in London (where he could as easily have got an English passport had he chosen, and had his *status* permitted him); had his property in America; and although he afterwards returned to Ireland, and died in Kenilworth-square in 1864, having (it may be assumed) resumed his domicil of origin in 1856 when his son came of age, I have no doubt that his domicil was American. Thus, since the domicil of the father determines that of the child when under age, the domicil of Edward Campbell Davis was American in 1856, and there can be no question that he retained that domicil when he married the plaintiff on the 10th January, 1858. The ceremony was performed by the Rev. Dr. Eccleston, the Rector of the Episcopal Church of St. John's. Dr. Eccleston was and is a clergyman in Holy Orders; and on the same occasion married Mr. James M'Andrew to the plaintiff's sister, Julia. Thus in 1858 the domicil of origin of Edward Campbell Davis was Irish; but his domicil of choice was American.

It is, however, equally clear that Edward Campbell Davis afterwards reverted to his Irish domicil. He came with his wife to reside in Kenilworth-square, Dublin. He afterwards sold a large part, if not the whole, of his American property. He instituted a

suit in the Court of Chancery here to administer his father's estate. He lived here as an Irishman. He died here, having made an Irish will. His wife believes that he did not intend to return to New York. He executed legal documents here; and having regard to the fact that it is always easier to prove a reverter to a domicil of origin than the acquisition of a new one, I have no doubt that when he came to Ireland and lived and died here, there was, on his part, not alone the *factum* but the *animus* which must both be present to confer *status*.

On his death in 1871 the plaintiff continued to live on at Kenilworth-square for some ten years with her mother-in-law, till the death of the latter in 1881; and continued (with a sister, I think) to occupy the house for a year or so, when everything was sold off, and she returned to America, taking with her, or sending there, any moveables she possessed (they do not appear to have been many), and finally, so far as I can gather, winding up her affairs, and clearing out of Ireland, where she had no relations, and, save the income of her husband's property, no interests. There can be no question that she then abandoned her Irish domicil of choice. If she did this without acquiring any other domicil, the domicil of origin, which inseparably and inevitably cleaves to one through all vicissitudes, would have revived; and that was English. But she did not return to England as a home. It was not necessary for her to do so to resume her English domicil; but as a fact she did go to America, and thenceforward resided there till 1891, except when she travelled abroad, as sometimes occurred. In considering *quo animo* she went to America, it is to be observed that in her case her domicil of origin was little more than a technicality. Though born in England, she had spent her life, till married, in America as an American. She had really no home elsewhere; no associations with England; no interests there of any permanent sort. Her sister, Mrs. M'Andrew, died in London, and Mrs. Davis was present, having come from the Continent, I believe hurriedly, to be with her. But it would have been the same had her sister died in Paris or Vienna. In such circumstances it is far easier to prove the adoption of a new domicil, or the resumption of a former domicil of choice, than when the domicil of origin has

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been a real home to which nature and sentiment would prompt a return. But still the *factum* of a return to America being proved, the question is what was the *animus* that led to it, or that led to her remaining in America when there. As to this her evidence in Court is really conclusive. She said: "Leaving Kenilworth-square, I went to Staten Island, to my father's house. That was my home. It was my head-quarters from that time, except when I was travelling about." Considering that this was the home of her father and mother and her brothers and sisters, it was not only a natural place, but *the* natural place, for this lady, without children or ties elsewhere, and without any other home, but free to choose any residence in the world she pleased to go to. I do not know that any more apt language could be devised to describe a legal domicil than the words I have quoted from her own lips. It rivals in perspicuity even Lord Westbury's celebrated description of what constitutes a domicil in *Udny* v. *Udny* (1). It is true she sometimes travelled, and it is also true that she sometimes stayed as a guest at Mr. M'Andrew's house. But domicil does not require permanent residence in one particular home. One may have a domicil without any permanent residence. Many persons have no permanent residence; yet the law says that everyone must have a domicil. This lady went to America as to her home, her head-quarters except when travelling. She felt as an American; and in the witness-box spoke of America quite naturally and frankly as "our country"; not in the sense of a power to which she owed allegiance, but as a land where she had her home. This continued till 1891. I have no doubt that the plaintiff's domicil at the date of her marriage was not English nor Irish, but American. America was the place "*ubi larem rerumque ac fortunarum summam constituerat; unde rursus non esset discessura si nil avocasset; unde cum profecta est, peregrinari videbatur; quo si rediit, peregrinari jam destituerat.*"

A somewhat more difficult question remains as to the domicil of Mr. M'Andrew; and it too has to be decided, because if his domicil on the 24th June, 1891, was British, the marriage was void, whatever hers may have been. The chief facts bearing on this question are as follows:—

(1) L. R. 1 H. L. Sc. 441.

He was born in Camberwell in 1827, of parents who, though of Scotch extraction, were English people. In 1852 he went to America as agent for the London trading firm of which his father was principal, opened an office in New York, and thenceforward for some time was the agent for the London house. One of his brothers was for a time agent in Seville for the same firm, but does not appear to have acquired a Spanish domicil. In 1858 James M'Andrew married (as has been stated) Julia Cuthbertson. In the interval between 1852 and 1858 he several times crossed to England, remaining a month or two on each visit; and he kept up the practice after his marriage, as I gather mainly for business purposes. His wife died in 1884 in London. His home was in America, whether his domicil was or not; he lived on Staten Island, where at a place called Middleton he first rented and afterwards bought a fine house and fee-simple lands. The house was re-built by him after a fire, and he added to the lands by buying up adjoining property when occasion offered, and improving them from time to time. His children were born and brought up, educated, and married, and some of them died and were buried, in America. One of his daughters latterly lived in a house close to his in Middleton. He purchased his business place in New York in fee. He rented a factory in New Jersey, which he still has, and in which he carries on trade as a manufacturer of emery. He made a great deal of money in the States, and bought a shooting and fishing place in Canada, to which he went for recreation each year. He has expended on fee-simple property in the States between £15,000 and £20,000, and has it still, deriving rent for some, some being unoccupied except by his caretakers or servants. At the time of the marriage of the 24th June, 1891, he was in occupation of his residence at Middleton. He finally retired from business in 1887 or 1888, except as to the emery factory, which he still keeps going, leaving the management of it to assistants. One of his chief trades was in liquorice paste, the turnover of that article being $1,000,000 in the year. Down to and after his second marriage he had his beautiful house in Staten Island. "His home was always there to go back to," as his sister-in-law, Miss Cuthbertson, expressed it, and he kept up a large retinue of servants, and had his horses and carriages there. Whether, judged by the

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scale of New York, he was a rich man or not, he would undoubtedly have been considered a rich man, or a man very well off indeed, in England, and, till after his marriage in 1891, he had no place of his own, and no property in England whatever; all his wealth was acquired in America and all his investments were there. It is true that when he visited London with his wife and daughters, as he sometimes did, he took either apartments or a furnished house, but this was a temporary matter. He sometimes had money in England; but that was merely a balance in the books of the firm whose agent he was, and, as he said himself, the balance was more usually against him. For a time he had been a churchwarden or a vestryman in Dr. Eccleston's church, though for some cause or other he ceased to be so while remaining a member of the church and a communicant. There is nothing in this, however, for, not being a heathen, it was natural that he should be attached to some church, whatever his ultimate intentions as to domicil might be. He was never naturalised as an American citizen; and although, of course, naturalisation is not the test of domicil (if it were, the task of a Judge in these cases would be a simple one), it is a circumstance by no means to be omitted from view. Further, in the year 1876, he obtained an Act of the Senate and Assembly of the State of New York, authorising him to hold and dispose of, in fee-simple or otherwise, all his then present or future real estate in the State, as if he were a citizen of the United States. Such an Act is now, it appears, more difficult to obtain than it then was; and even then, it cost him some £50 to obtain it. This shows that in 1876 he had not determined to assume the duties and obligations of American citizenship; but it does not prove that he had not made America his home, or that he ever intended to leave it. Since his second marriage he has bought a place in England for £20,000, and he has now brought over his furniture from America, storing it till his new home is ready. This, however, is only important so far as it may throw back a light on the state of things at and before June, 1891. Both he and the plaintiff state that he was for some time looking out for a place in England, and had visited several which did not suit.

These are the chief facts concerning Mr. M'Andrew in relation

to this question, as distinguished from expressions of intention, and if the case rested on them (that is the facts) alone, no one would question that his domicil was American. Suppose he had died before June, 1891, could it have been doubted? But there is a considerable body of testimony, chiefly amongst the witnesses examined on commission in America, going to show that Mr. M'Andrew was frequently known to express himself as in spirit and feeling an Englishman, and anything but an admirer of American institutions. Some of the witnesses also speak of his having expressed an intention to return to England.

Mr. Wann, who was himself originally a North of Ireland man, was asked on cross-examination—"Do you know whether Mr. M'Andrew is an Englishman or American?" He said—"He is an Englishman. He never declared his intention to become a citizen. I am pretty sure as to that. I often wanted him to become an American citizen, but he said England was his home, and he never would. His idea was to return to England always." He was asked—"Did I understand you correctly to say that you had urged him to become an American citizen?" He said—"I have often talked to him about it in a social way." *Question.*—"And to that he always replied that he intended to go back to England?" *Answer.*—"Yes, that is my impression always." Then he said that he (M'Andrew) did not say when he intended to return to England, nor give any date as to his return. He was asked—"All you know about it is that he gave you a general impression that sometime he might return to England?" To that he gave an affirmative answer, and said that he thought M'Andrew was born in England. He was asked—"When were these conversations going on about England?" He said.—"I don't know; frequently we used to be 'gassing' about it." (I suppose that means "talking jocularly.") *Q.*—"Have you had any conversation with him lately, during the last two or three years, about it?" *A.*—"No." *Q.*—"But previous to that time you had?" *A.*—"Yes." *Q.*—"And he simply said that some time he might return to England?" *A.*—"Yes, that was my impression that he always intended because his relatives and brothers in China all landed back in England to make that their home." He says he used to go back and forward to England frequently, and then returned to business in New York.

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Q.—"He devoted most of his time to business, did he not?" A.—"No, I don't think he did; not latterly." Q.—"What do you mean by latterly?" A.—"Within the last ten years." Q.—"Prior to that time he was in his office constantly?" A.—"I think so; yes." Q.—"Now you said that he was an Englishman and not an American?" A.—"Yes." Q.—"Do you mean that he was born in England?" A.—"Yes." Q.—"And was not an American citizen?" A.—"He was not naturalised." "No Sir." Q.—"That is all you mean?" A.—"Yes," and then he is asked—"You also mean that he told you he expected to go back and live and die in England?" A.—"Yes, Sir, and I think all his friends thought the same way."

The next of the witnesses was Mr. Nicholls, of Staten Island. He is asked, "How did you know him?" He says, "He was the rankest Englishman I ever met." Q.—"A true Britisher?" A.—"Yes, and everything that was American he decried." Q.—"Did you ever hear him speak about going back to the old country?" A.—"No, I can't say that I did." Q.—"But your acquaintance you described rather as a casual acquaintance than as an intimate acquaintance?" A.—"First it was casual and then ripened into an intimacy." And he is asked (p. 45)—"When you say you counted him as an Englishman, what do you mean, do you mean he was born in England?" He replies—"I mean in conversation with him or in reading the newspaper, if anything English was animadverted upon, he was up in the air and abused us, and said we ought to be ashamed of ourselves." Q.—"He simply expressed an affection for England rather than the United States?" A.—"Yes, decidedly."

Dr. Eccleston was asked—"Did you know him as an American or Englishman?" He said—"He is an Englishman of course." Q.—"Never became an American citizen that you know of?" A.—"I don't think he did, my impression is he never did." Q.—"He had strong English views?" A.—"Yes, he was a decided Englishman in his sympathies and views, everybody knew that." Mr. Schipper is examined. As concerning the firm he was asked—"Who was in charge of the whole thing, was Mr. M'Andrew there?" A.—"Yes a large portion of the year he was there, a good part of the time he went home." Q.—"What do you mean

by 'going home'?" *A.*—"He always said when he went to England, 'I am going home.'"

Mr. Watson was examined and his evidence is a little more definite. He is asked—"During the time that you have known him, have you ever heard him speak as to his intention of remaining in this country or of returning to England?" He said—"He always said when he got older, and through with all his business here, he would go back home to England. That is what he used to say." He was subsequently asked as to the conversations with M'Andrew, and he said that they were general conversations, and that he always stated that his ultimate intention, when the proper time came, was to go back to his home in the old country. *Q.*—"Did he say when this was to be?" *A.*—"No; he talked that way for years." *Q.*—"He did not fix any definite time?" *A.*—"I could not do it." *Q.*—"He did not in these conversations fix any definite time when he intended to return?" *A.*—"When he had made his fortune." He said—"He told me he would rather do anything than renounce his allegiance. He is a very staunch Englishman always." I refer lastly to the evidence of Mr. White, p. 227. *Q.*—"Have you ever had any conversation with him as to his intention to renounce or not to renounce his British citizenship?" *A.*—"I never had any conversation specially in that way. I have always known from general conversation with him that he never intended to." *Q.*—"Do you know what his intention was in respect to returning to England?" *A.*—"I always had a positive belief that he would return." *Q.*—"And you heard him state that was his intention?" *A.*—"Yes." *Q.*—"How is the fact that he intended to return to England impressed on your mind?" *A*—"Largely from the reason that we were very intimate together as neighbours; at that time we expected to remain with my brother's family, that we would always have Staten Island as our home, and that sooner or later Mr. M'Andrew would break up and leave to go back to England, and that we would miss his society and friendship." Again the same witness said—"I should say most decidedly, he was an Englishman." He is asked how he knew? and he said—"I know that his family were English people. I met his brother, who came over to visit him, who was an Englishman, and I always heard him refer to England as his birth-place and the finest place

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in the world, and the only place in the world." *Q.*—"Did he ever tell you he was born in England?" *A.*—"I don't think I ever went into details with him on that part of it;" and he says—"I heard him speak of his being a young boy in England, and the walks he would take, and the things a boy would likely do." As to his intention to return this witness says—"I only remember specifically that he has, at times, stated ultimately he was to return to England to die in the house of his fathers." He is asked—"As to his intention to return, you say his intention to return was expressed in different ways, at different times. Did he say when he was going to return?" *A.*—"No, Sir." *Q.*—"He simply said some time he might return?" *A.*—"He did not say, 'he might'; he said 'he would.'" *Q.*—"At some time?" *A.*—"Yes."

I entertained, and still feel, some doubts whether these statements and declarations (such as they are) are evidence in the case. No doubt similar statements have been admitted in many cases to show intention; and when they can be brought within the very elastic definition of parts of the *res gestæ* they are in principle unobjectionable. I am not sure, however, that affirmative statements of this sort have ever been received to prove the intentions of a living person, capable of being examined and actually examined, in order to confirm his evidence in his own favour and interest. But the evidence was not objected to till after it had all been put in, save in one instance, and that on the curious, and to me unintelligible, ground that the statement had been made by M'Andrew to a person now dead. On the whole, as the action is not by him, but by his alleged wife, I think that the evidence was not inadmissible, and its effect was discussed by both parties in detail.

There was a curious discrepancy between the evidence of the plaintiff and that of Mr. M'Andrew on this part of the case. He says that their marriage was discussed and arranged in London some time before it took place, and that there was an understanding between them that they should come to live in England. He says, too, that he had been looking for an English residence some two years before the marriage. She says that there was no arrangement or understanding as to a marriage at all till a couple of days before it took place, that is, immediately after her arrival in New York from England on the 20th or 21st June. She says, too,

that it was after the marriage that he examined different places in England, some twenty-nine in number, with a view to settling there. That the marriage was arranged before this I have little doubt. And I have equally little doubt that her motive in denying it was that she was at that very time negotiating with the Governors of the Blue Coat Hospital for a sale to them of her life interest, suppressing, or at least not disclosing, the fact that she intended to forfeit it by contracting what she deemed a marriage. It is not pleasant to dwell on this somewhat discreditable part of the case. But on the important question of his declared intentions as to residence this reason does not apply; and it is important to note that the statement she particularly mentions as made by him was one not to her but to her sister, his first wife (objected to by Mr. Price on the odd ground that the wife was now dead). Her evidence therefore to some extent neutralises his on this point.

As to his actual intentions and *animus*, he says:—"My intention always was to return to England; I had no home in England except my father's house. This matter about returning *was* discussed by me with friends between 1852 and 1884, the year of my wife's death. I cannot repeat all the conversations, but I think my personal friends knew that my desire was to live in England eventually. It was a matter of conversation between myself and my wife and between me and very intimate English friends and others."

On the whole, I have come to the conclusion, as matter of fact, that when Mr. M'Andrew first went to the States he had not the intention of permanently settling there; but that he afterwards found it a good place to settle down in, and did so settle. I think, however, it also appears that in sympathy and feeling he never ceased to be an Englishman; that he objected to become naturalized as an American citizen, chiefly in order to avoid the obligations of such citizenship during the war; and that he did in some undecided, indefinite, and hazy way, intend, or at least hope, to return to the old country, when he had got "his business through," or when he had "made his fortune." This intention or hope, however, he did not realise when the occasion arose, that is, when he retired from business in 1887–1888; but, on the contrary, he remained on just as before, and continued

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adding to and improving his dwelling-place down even to the time when the evidence was taken by Commission last year.

If this, then, be the true view of the facts, it remains to see what is their legal result as to his domicil in June, 1891.

It is clear that a domicil once constituted can only be changed by proof of an intention to do so, coupled with an actual change of residence. It must be *animo et facto.* In *Munro* v. *Munro* (1) Lord Cottenham says (p. 876) :— "Questions of domicil are frequently attended with great difficulty; and as the circumstances which give rise to such questions are necessarily very various, it is of the utmost importance not to depart from any principles which have been established relative to such questions, particularly if such principles be adopted, not only by the laws of England, but generally by the laws of other countries. It is, I conceive, one of those principles that the domicil of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning the former domicil and acquiring another as his sole domicil. Such, after the fullest consideration of the authorities, was the principle laid down by Lord Alvanley in *Somerville* v. *Somerville* (2), and from which I see no reason for dissenting. So firmly indeed did the civil law consider the domicil of origin to adhere, that it holds that if it be actually abandoned, and a domicil acquired, but that again abandoned, and no new one acquired in its place, the domicil of origin revives. To effect this abandonment of the domicil of origin, and substitute another in its place it required *le concours de la volonté et du fait, animo et facto;* that is, the choice of a place, actual residence in the place then chosen, and that it should be the principal and permanent residence, the spot where he had placed *larum rerumque ac fortunarum suarum summam;* in fact there must be both residence and intention. Residence alone has no effect *per se*, though it may be most important as a ground from which to infer intention. Mr. Burge, in his excellent work, Commentary on Colonial and Foreign Laws, vol. i., p. 54, cites many authorities from the civilians to establish this proposition. It is not, he says, by purchasing and occupying a house or furnishing it, or

(1) 7 Cl. & Fin. 842. (2) 5 Ves. 787.

vesting a part of his capital there, nor by residence alone, that domicil is acquired, but it must be residence with the intention that it should be permanent. In allegations depending upon intention, difficulties may arise in coming to a conclusion upon the facts of any particular case, but those difficulties will be much diminished by keeping steadily in view the principle which ought to guide the decision as to the application of the facts. And in the same case Lord Brougham says:—"The third of those rules which he extracted from decisions is very material in the present instance, and seems undeniable as the rule of the Scotch, as well as of the English Courts; and I apprehend it is the rule universally that, where a domicil has been constituted, the proof of the change of domicil is thrown upon the party who disputes it, and that you must show distinctly that there has been the *animus* as well as the *factum*, that there has been a desire and intention to change the domicil as well as the fact of leaving that place of residence, in order to alter the former domicil and to acquire a new one."

Now in the present case there is no pretence for holding that if once Mr. M'Andrew had acquired an American domicil he had lost it, and resumed his domicil of origin before the marriage, for till after that event he had no English residence at all; he had in no way abandoned his fixed abode in America; and the *factum* was wanting whatever the *animus* might have been. The real question is, had he ever lost his domicil of origin by the acquisition of a new one? that is, had he settled in America so as to make it his permanent home? "Had he the settled purpose to make America his future place of residence, and set up his tabernacle there; to make it his future home?" Lord Westbury in *Bell* v. *Kennedy* (1). If he had this settled purpose *at any time* during his actual residence in the State of New York, he had an American domicil, which on the facts proved if once acquired continued in force at the *punctum temporis* in question, that is, on the 24th June, 1891.

The fact that originally his sojourn in New York was not of this fixed character could not prevent the subsequent consti-

(1) L. R. 1 H. L. Sc. 307.

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tution there of a domicil of choice. In *Udny* v. *Udny* (1) Lord Westbury says (p. 458) :—"Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with the intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed, not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited; and in such a case, so soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicil is established."

Now, apart from the conversations deposed to in this case, there is no room for doubt that the *animus manendi* not only could but must be inferred from what was actually done by Mr. M'Andrew. The absence of naturalisation proves nothing. Domicil of choice may exist without the least intention *exuere patriam*, or to shake off allegiance to it. A man with no other home goes to America; buys houses and lands there; sets up large and varied businesses; acquires a fortune; builds and rebuilds a spacious and splendid home on his own freehold; marries an American wife; rears and educates his children, and sets them up in life there; actually lives there for near thirty-nine years, acquiring vast interests, and making all his investments in that country. Now, as I have already said, had that man died in America before 1891, who would have questioned that his domicil was in the place he had so settled in? But the difficulty in the case arises from the fact that I believe he did in an undecided, hazy, and indefinite way, intend or hope to return to England when he had done with America and made his fortune there. Did the presence of this mental undercurrent prevent the acquisition of an American domicil so that at every or any moment of time from 1852 till 1891 he was still a domiciled Englishman?

(1) L. R. 1 H. L. Sc. 441.

The change of residence which will confer a new domicil is spoken of in many of the cases as a change of a *permanent* character. James, V.-C., says in *Haldane* v. *Eckford* (1), after quoting the passage I have already read from *Udny* v. *Udny* (2):— "That is the rule as laid down by Lord Westbury. In substance it is the same as the rule laid down in the same case by the Lord Chancellor, and differs but slightly, I think, from the rule as laid down by Lord Chelmsford. I agree that it must be considered as differing from the rule as laid down in what may be called the intermediate class of cases in the Exchequer: *In re Capdevielle* (3); *Attorney-General* v. *Countess de Wahlstatt* (4), following the decision in the House of Lords, *Moorhouse* v. *Lord* (5), in which, if I may use the expression, that unfortunate term *exuere patriam* was introduced, as if it were a question of nationality, and not of more or less permanence of residence. It does differ from those cases; but it differs in bringing back the law to that which (in my opinion) was always, before those cases, considered to have been the law, and evidently is the law as laid down by the treatise-writers, viz. that domicil was to be considered as changed whenever there was a change of residence of a permanent character voluntarily assumed. The rule is expressed in the judgment of Lord Justice Turner in *Hoskins* v. *Matthews* (6). There he says:— 'The question to be determined is, what is the just conclusion as to the change of Mr. Matthews' domicil to be deduced from these facts? Questions of change of domicil depend upon the *animus* and the *factum*. There is in this case no doubt as to the *factum*. That the villa *Lorenzi* was the home of Mr. Matthews for a long time before his death, and, in the most forcible sense in which the word "home" can be used, seems to me to admit of no question. It was the place in which he had set up his establishment, in which his fortune, so far as his fortune admitted of locality, was centred, in which he lived with such of his children as were not at school or in the world, which he destined for their future residence, from which he went forth, and to which he returned, and in which he expected to die. There is not, so far as I can see,

(1) L. R. 8 Eq. 631.
(2) L. R. 1 H. L. Sc. 441.
(3) 2 H. & C. 985.
(4) 3 H. & C. 374.
(5) 10 H. L. C. 272.
(6) 8 D. M. & G. 13, 26.

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any element wanting in this case which could tend to constitute a domicil *de facto*.' With very few, and not to my mind material variations, that state of things pointed out by Lord Justice Turner may be predicated of the case now before me. Beyond all question the testator did reside in Jersey. He resided there for a great number of years. It was the place from which he went out when he went to visit or travel; it was the place to which he returned after he had visited or travelled. It was the place in which he set up his family, because it appears that, having no children, there were two grandchildren to whom he seems to have been exceedingly attached, one of whom resided there with him from 1853 as his permanent home."

But it is a question what is the precise meaning of the word "permanent" in this collocation. In *Attorney-General* v. *Pottinger* (1) Baron Bramwell expresses a preference for the word "indefinite"; and the later cases show that whichever word is used, the meaning is the same. In *Brunel* v. *Brunel* (2), no regard was paid to evidence of statements by the intestate, a Frenchman by birth, that he would not give up his citizenship of Paris, that he was a Frenchman, and might return to reside in Paris, and that he consequently declined to become a naturalised British subject, even though warned that he could not legally hold a lease which he was taking of property in London without naturalisation. There were, however, strong facts pointing the other way in that case.

In *Douglas* v. *Douglas* (3), Wickens, V.-C., says:—"It seems to me, as it did to James, V.-C., in *Haldane* v. *Eckford* (4), that the intention required for a change of domicil, as distinguished from the action embodying it, is an intention to settle in a new country as a permanent home, and that if this intention exists and is sufficiently carried into effect, certain legal consequences follow from it, whether such consequences were intended or not, and perhaps even though the person in question may have intended the exact contrary."

Doucet v. *Geoghegan* (5), however, is the most important case

(1) 6 H. & N. 733.
(2) L. R. 12 Eq. 298.
(3) *Ibid.* 617.
(4) L. R. 8 Eq. 631.
(5) 9 Ch. Div. 441.

in reference to the kind of permanence which must be intended in order to effect a change of domicil.

I do not propose to go through the facts of that case. It came first before Malins, V.-C., and he adopted the view that, although there was evidence both ways, Doucet had frequently expressed intention of remaining in England, though he had made loose general statements of intention to return to France, and he held that he had acquired an English domicil. On that ground mainly he decided the case; but the Court of Appeal decided it on broad grounds, and the consideration of the kind of intention which is involved in the use of the word "permanent" was the subject of consideration and decision. Jessel, M. R., says: "The contention here is, not that the declarations can be read to show a change back to his original domicil, but to prove that he never intended to acquire a domicil in England. But they are much too indefinite for that purpose. A declaration that a man means to return when he has acquired a fortune is not sufficient to outweigh actions which show an intention of permanent residence. In all the cases a difficulty arises as to the meaning of the word domicil; but it evidently implies the intention to make the place one's home, and a home is itself suggestive of permanency. It is impossible to lay down an absolute definition of domicil, but in the present case there is every element that makes a home. The testator had no other home or place of residence; he showed by his actions no intention to change his residence. It is true that he only took his house for three or four years, but that is not sufficient to show an intention to change his residence. On the whole, it appears to me that there is nothing to outweigh the natural result of his acts, and that looking at his acts fairly, as a jury ought to do, the Court can come to no other conclusion than that his domicil was English. The appeal must therefore be dismissed with costs." And James, L. J., says:—"I am of the same opinion. It is not necessary for me now to express my opinion of the general question of the value to be attached to expressions of intention. I stated my opinion on that point in *Haldane* v. *Eckford* (1), and I adhere to the

(1) L. R. 8 Eq. 631.

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observations which I there made. With respect to the present case, I hardly remember one in which the domicil of a testator was more conclusively proved. Both his marriages were acts of unmitigated scoundrelism, if he was not a domiciled Englishman. He brought up his children in this country; he made his will in this country, professing to exercise testamentary rights, which he would not have had if he had not been an Englishman. Then with respect to his declarations, what do they amount to? He is reported to have said, that when he had made his fortune he would go back to France. A man who says that is like a man who expects to reach the horizon; he finds it, at last, no nearer than it was at the beginning of his journey. Nothing can be imagined more indefinite than such declarations. They cannot outweigh the facts of the testator's life." And Brett, L. J., says:—"I am also of the same opinion. The Vice-Chancellor has decided that the testator, although by birth a Frenchman, died an Englishman. The question is, whether we think that on the facts before him he was right in that opinion. It is said that to prove a change of domicil it is necessary to show both fact and intention. What is the fact which must be proved? It is that he had *de facto* changed his residence. What, then, was his residence? I think it is satisfactorily proved that he had taken up his residence in this country. Then as to his intention. Had he the intention of residing in England permanently? The definition of permanence is that it is not only for a period, either for a definite time or for a time limited by a condition. It is therefore necessary, in the first place, to determine whether the testator resided in this country as his home. It was proved that he entered into a business and a partnership in England, that he married an English woman by whom he had children, and that he never expressed an intention that his wife and children should have any other home. Considering the circumstances under which he came to England, and under which he married, I think it is impossible to say that the Vice-Chancellor was wrong in holding that England was the testator's home. Then was any period fixed in any way? It has not been seriously urged that the testator meant to return at the end of twenty years, or of any such fixed period. But it was said that he limited the

time by reference to the performance of a condition, namely, of his making a fortune. I think that such a condition is not sufficient; it ought to be a condition which limits the residence to a definite time; and when the condition refers only to a time as indefinite as it can possibly be, it cannot be said to confine the residence to a definite time. There can be nothing so indefinite as the time at which a man expects to make his fortune. Therefore, as the testator did not fix a date or make any definite condition by which the residence was limited to a definite time, it must be taken that his intention was to make his residence in England permanent. Therefore the other proposition is established by the evidence."

It may be that some of the expressions of Brett, L.J., which I have read, go further than was necessary for the decision of the case before the Court. But it is impossible for me to hold consistently with that case, and with what the Court of Appeal did decide, that the kind of *animus revertendi* entertained by M'Andrew in the case before me, was enough to prevent the loss of his domicil of choice. It was lacking in every element referred to as needful by the Lords Justices.

The "unmitigated scoundrelism" which is mentioned in that case by James, L.J., consisted in the fact that if Doucet was not a domiciled Englishman his marriage would have been void in France, and so he would have been an unmitigated scoundrel by reason of his contracting such an illegal marriage when he actually intended to return to France. In the present case if M'Andrew was a domiciled Englishman in June, 1891, his marriage with the plaintiff would have been also void. There are cases in which it would be unfair to push the maxim that everyone is supposed to know the law to its full extent. But in this case the parties both swear they intended that the marriage should be a legal one, and believed it was. So far as the plaintiff is concerned she gave the clearest proof of that by her letters to Mr. Adair, of 23rd June, and 17th July, 1891. She stated in her evidence that she had had legal advice as to the marriage. Beyond all doubt the first thing any lawyer would ask, knowing that she was the sister of her intended husband's deceased wife, would be, what was his domicil, hers being at least presumably America? Yet she married in the belief that the

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marriage was valid. That is, presumably her adviser must have been told that both parties were domiciled Americans. And in the case of Mr. M'Andrew I cannot believe that he would have considered his marriage with a deceased wife's sister a binding one if he supposed that he was an Englishman whose civil rights and *status* were dependent on English law. I have only to add on this point that there is much in the correspondence in proof to lead to the very strong suspicion that the adoption of an English domicil after the marriage was an afterthought, intended to avoid the consequences of the marriage in respect of the wife's property. The possibility that such may have been the case illustrates the wisdom of the caution suggested by Lord Colonsay in *Bell* v. *Kennedy* (1) as to the weight to be attached, in reference to the question of intention, to the evidence of the interested parties, a caution reinforced by the weighty opinion of Chitty, J., in *Craignish* v. *Hewitt* (2), at p. 191, and, indeed, frequently expressed in other cases.

Doucet v. *Geoghegan* (3) has never been questioned, and has been referred to with approval in later cases such as *Patience* v. *Main* (4) and *Craignish* v. *Hewitt* (2), decided by Chitty, J., and affirmed by the Court of Appeal. Chitty, J., says in that case :—"I have surveyed the evidence at some length in the result and on the assumption that the plaintiff's domicil of origin was Scotch. I find that the plaintiff acquired by choice a domicil in England from the time when he went to reside with his wife in the house at Albert Gate, and that the domicil thus acquired was not afterwards abandoned, but continued to the death of his wife. The evidence of the fact of residence here is amply sufficient. The true inference to be drawn from the evidence of the circumstances surrounding and accompanying the fact of the residence here, when taken in connection with the plaintiff's own letters and the other facts of the case viewed as a whole, appears to me to be that the plaintiff formed the intention of residing here indefinitely. There was the *animus revertendi* and *manendi*. According to Story's definition that place is properly the domicil of a person in which his habitation is fixed without any present intention of removing therefrom: Story's Conflict of Laws (section 43). There was no present intention on

(1) L. R. 1 H. L. Sc. 307.
(2) [1892] 3 Ch. 180.
(3) 9 Ch. Div. 441.
(4) 29 Ch. Div. 976.

the plaintiff's part to remove from London. London, which was at first merely his head-quarters, afterwards became his home; he treated it as his home, and called it his home; more particularly he considered the house at Albert Gate, where he lived with his wife, as his home. A man may be in fact homeless, but he cannot in law be without a domicil. Subject to this distinction the term 'home,' in its ordinary popular sense, is practically identical with the legal idea of domicil: Dicey on Domicil, pp. 42–55."

Judged by these tests, I am of opinion that, on the 24th June, 1891, the domicil of James M'Andrew was American. I have already decided the same proposition as to that of the plaintiff. It follows that notwithstanding their united protest, their marriage was valid and legal; and that this action must be dismissed with costs in favour of both sets of defendants.

The plaintiff appealed.

Serjeant Jellett, *M. J. Bourke*, *Q.C.*, and *W. M. Jellett*, for the appellant:—

The words in the will, "after her decease or future marriage," refer to the plaintiff contracting a marriage recognised as valid by the law of the country in which she is then domiciled: *Martin* v. *Shepherd* (1). If at the date of the marriage both the plaintiff and James M'Andrew were domiciled British subjects, or if either of them was so, the marriage was void, even although the parties intended that a valid marriage should be solemnized, and believed it had been effectually celebrated: *Chapman* v. *Bradley* (2). It was there held that the limitations in a marriage settlement "after the solemnization of the marriage" never arose, where the marriage with a deceased wife's niece was celebrated at Neuchatel, where such a marriage is valid, and in the belief that a valid marriage was constituted by the ceremony. Though the form of the ceremony is regulated by the *lex loci contractus*, the contracting capacity of the parties is governed by the law of their domicil: *Brook* v. *Brook* (3), a case of marriage with a deceased wife's sister, in which the parties, who were British

(1) 12 Ir. L. T. R. 142. (2) 4 De G. J. & Sm. 71. (3) 9 H. L. Cas. 207.

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subjects, domiciled in England, intending to constitute a valid marriage, went through the ceremony in Denmark, where such a marriage is valid, though void in England under 5 & 6 Wm. 4, c. 54; also *Sottomayor* v. *De Barros* (1); and *Mette* v. *Mette* (2).

Prior to 5 & 6 Wm. 4, c. 54, such a marriage as in the present case was voidable only, and stood confirmed if the parties died without avoiding it: *Reg.* v. *Chadwick* (3). The object of the statute was to render such marriages in all cases *ipso facto* void if celebrated between persons domiciled in England or Ireland. The domicil of both of the parties here, on the 24th June, 1891, was British. To consider each separately—1, as to the plaintiff. She was born in London on the 1st September, 1835, her parents being domiciled British subjects. Her domicil of origin was, therefore, British. She went to America in 1838 to reside with her parents, and on the 10th June, 1858, she was married to Edward Campbell Davis. His domicil then became hers. E. C. Davis was born in Swift's Hospital, Dublin, where his uncle was the resident physician. His parents were both British subjects, domiciled in Ireland. John J. Davis, his father, had gone to America shortly before E. C. Davis was born, and his wife and child followed him in 1835. He carried on the business of a wine and spirit merchant in New York, at first by himself, and afterwards in partnership with his son, E. C. Davis. On the 29th June, 1858, this partnership was dissolved, and in 1859 he returned to Dublin, his domicil of origin, and took a lease of building ground, where he built the houses, the subject of the present action, including a residence for himself, where he continued to live until his death. He died in Dublin on the 7th February, 1864, and legacy duty was paid on his assets as of a person domiciled in Ireland. Previous to his death the plaintiff, with her husband, E. C. Davis, returned to Dublin, when the domicil of origin of the latter, if it was ever lost, revived. On the 15th June, 1864, E. C. Davis, through whom both the plaintiff and defendants derive their title, filed a cause petition in Chancery, in which he described his father as domiciled in Ireland, and sought to administer his assets. E. C. Davis after-

(1) 3 P. D. 1. (2) 1 Sw. & Tr. 416. (3) 11 Q. B. 211

wards died, and legacy duty was paid on his assets as of a person domiciled in Ireland: see *Thomson* v. *The Advocate-General* (1). After his death the plaintiff, his widow, continued to reside with his mother at Rathmines, in the County of Dublin, for ten years, till the death of the latter, on 22nd April, 1881, retaining either her husband's domicil or her own, which was British. In the application of the statute 5 & 6 Wm. 4, c. 54, which extends to England and Ireland alike, there is no distinction between English and Irish domicil. After the death of her mother-in-law, the plaintiff continued to reside in Dublin for a year, and then travelled on the continent, returned to London to attend her sister, Mrs. M'Andrew, in her last illness, visited her other sisters, who were resident in America, but, it is submitted, retaining during all this time her domicil of origin, which must be presumed to have continued until another sole domicil was acquired by actual residence with the intention of abandoning the domicil of origin. The change of a domicil of origin must be *animo et facto*, the *onus* of proof resting on the person who asserts that it has been effected: *Aikman* v. *Aikman* (2); *Munro* v. *Munro* (3). Intention alone is not sufficient. From 1882 until 1891 the plaintiff had no fixed residence, and no house she could call her own. Her parents were then both dead. In 1887 she paid a visit to Mr. M'Andrew in New York. He had been married to her sister, and was then a widower. He had three daughters, and for four years the plaintiff continued to reside with him, superintending their education. One of the daughters died, another married a resident in New York, and the third married a resident in London, after which she ceased to reside at the house of M'Andrew. In the spring of 1891 the plaintiff came over to Dublin, and in June of the same year she went to New York and married James M'Andrew, her domicil of origin during all this time, it is submitted, remaining unchanged. No case has established that a domicil of origin can be lost by residence as a visitor in another's house unaccompanied by expressed intention to change it: *Udny* v. *Udny* (4); *Bell* v. *Kennedy* (5).

(1) 12 Cl. & Fin. 1.
(2) 3 MacQ., H. L. C. 877.
(3) 7 Cl. & Fin. 842.
(4) L. R. 1 H. L. Sc. 457.
(5) L. R. 1 H. L. Sc. 307.

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In *Whicker* v. *Hume* (1), the only case in which the House of Lords decided that the domicil of origin had been lost, the intention to abandon was clearly proved by letters written by the testator, expressing his resolution never to see Edinburgh again. Domicil is quite distinct from allegiance, and the expressions erroneously used by Lord Cranworth on this subject in *Moorhouse* v. *Lord* (2) were corrected in *Udny* v. *Udny* (3); but the judgments of the other lords contain no such expressions.

As regards M'Andrew, his domicil of origin was confessedly English, having been born in London, and his parents being both domiciled English subjects. In 1852 he went to America as agent for his father's house, in which he never was a partner. He was liable, therefore, to be recalled at any time at the will of his principal.

Mere length of residence in a foreign country, however long, if accompanied by a fixed intention to return to the domicil of origin as soon as the person has acquired sufficient means to enable him to retire from active employment, will not change the domicil of origin: *Allardice* v. *Onslow* (4); *Jopp* v. *Wood* (5), affirming the decision of Lord Romilly (6) on appeal, pronounced after a second argument, and on a re-hearing, after the judgment delivered by Kindersley, V.C., in *Allerdice* v. *Onslow* (4). And *Bremer* v. *Freeman* (7) is to the same effect.

The evidence here, we submit, all points the same way, and was mainly elicited on cross-examination of the defendants' witnesses—Wann, Nicholls, the Rev. Mr. Eccleston, Alice Cuthbertson, and Schipper, all prove that James M'Andrew always insisted on representing himself as an Englishman, and as having formed a fixed intention of returning to England, and ending his life there. He refused to be naturalised as an American when pressed to do so. He returned to England every second year till 1885; and afterwards, in every year, procured at some cost a private statute to enable him to hold landed property, as if he were an American subject, and sell it again, a proceeding neces-

(1) 7 H. L. Cas. 124.
(2) 10 H. L. Cas. 272.
(3) L. R. 1 H. L. Sc. 441.
(4) 33 L. J. (N. S.) Ch. 434.
(5) 4 De G. J. & Sm. 623.
(6) 34 L. J. (N. S.) Ch. 212.
(7) 1 Deane, 192.

sary; and, finally, he expended £20,000 in the purchase of a property in the County of Surrey, where he now resides.

The facts in *Doucet* v. *Geoghegan* (1), relied on by the Master of the Rolls, are so entirely dissimilar from the present case that it forms no authority for his decision. In that case the expressed intention of the person whose domicil was disputed was totally at variance with his acts, and the Court gave effect to the latter. It is otherwise where the expressions of intention are in consonance with the whole of the facts of the case, as they are in the present.

Price, Q.C., Campbell, Q.C., and *C. L. Falkiner*, for the defendant:—

1. As to the case of the plaintiff, John Joseph Davis was made a naturalized citizen of America in 1844, and the domicil of his son, E. C. Davis, was American. In 1858 the plaintiff was married to E. C. Davis, and then acquired an American domicil. E. C. Davis returned to Ireland in 1868, but on his death, in 1868, the plaintiff's domicil of origin did not revert *simpliciter*: *Warrender* v. *Warrender* (2), *Gout* v. *Zimmermann* (3). The plaintiff disposed of all her chattel property before she left Ireland in 1882, and in 1889 she sold the rest of the property devised to her by her husband. It might be that at the moment the plaintiff left Ireland in 1882 her domicil of origin reverted; she said she made her mother's house her "home." That shifts the *onus* of proof, and from that time, for nine years, she was a domiciled American, having property in New York, and none in Great Britain. When a person leaves his domicil of origin with the intention of residing in the country to which he goes for an indefinite period, once he carries out that intention in fact the change of domicil is complete: *Stanley* v. *Bernes* (4).

2. As to the case of M'Andrew—although he did not give up his allegiance, yet still he may be a domiciled American. Not only is domicil distinct from allegiance, but the acquisition of a new domicil is compatible with an express intention to retain the old allegiance: *Brunel* v. *Brunel* (5). Down to 1861 the rule of law never contemplated that there was any connection between allegi-

(1) 9 Ch. Div. 441.
(2) 2 Cl. & Fin. 523, 525.
(3) 5 Notes of Cases, 445.
(4) 3 Hag. 418.
(5) L. R. 12 Eq. 298.

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ance and domicil; between 1861 and 1869, on account of the judgment of Lord Cranworth in *Moorhouse* v. *Lord* (1), it seems to have been thought that the doctrine of *exuere patriam* influenced domicil; then came the decision of *Udny* v. *Udny* (2), which restored the law to what it was before *Moorhouse* v. *Lord* (1). The entire of the acts of M'Andrew's life show that he was an American citizen; he acquired and held a large amount of real property which is always significant evidence in favour of permanent residence: *Drevon* v. *Drevon* (3). He carried on business there all his life and acquired considerable wealth, and he married and brought up his children there. Residence, when continued for a long period of years, is strong evidence of intention to acquire a domicil: *Hodgson* v. *Beauchesne* (4). The coincidence of residence and *animus manendi* were fully considered in *Haldane* v. *Eckford* (5), where it was held that residence originally temporary, and intended for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose or *animus manendi* can be inferred, the fact of domicil is established. The idea of waiting until he makes a fortune is too indefinite, and if the time become unlimited his domicil will be changed: *Douglas* v. *Douglas* (6); *King* v. *Foxwell* (7). If a man goes to a foreign country to make a fortune, with an indefinite intention of returning, length of residence coupled with all the acts of his life will change his domicil: *Doucet* v. *Geoghegan* (8); *Craignish* v. *Hewitt* (9). It is not necessary to prove a permanent residence; it is enough to constitute a domicil of choice if the person has gone for an indefinite period, coupled with the fact of such residence: *Bruce* v. *Bruce* (10); *Attorney-General* v. *Pottinger* (11).

Mere expressions of intention have little weight against the whole of the acts of a man's life: *Crookenden* v. *Fuller* (12); *Platt* v. *Attorney-General* (13). The declarations of intention here are so

(1) 10 H. L. Cas. 272.
(2) L. R. 1 H. L. Sc. 441.
(3) 34 L. J. (N. S.) Ch. 129.
(4) 12 Moo. P. C. 285.
(5) L. R. 8 Eq. 631.
(6) L. R. 12 Eq. 617.
(7) 3 Ch. Div. 518.
(8) 9 Ch. Div. 441.
(9) [1892] 3 Ch. 180.
(10) 2 B. & P. 229.
(11) 6 H. & N. 733.
(12) 29 L. J. (N. S.) P. & M. 1.
(13) 3 App. Cas. 386.

vague, as to be of no weight at all: *Anderson* v. *Laneuville* (1); *Attorney-General* v. *Fitzgerald* (2); *Re Steer* (3); *Aitchison* v. *Dixon* (4); *Stevenson* v. *Masson* (5).

The fact of the marriage is evidence of the previous domicil; it is evidence of the pre-existing intention: *Andrews* v. *Ross* (6). As to the payment of duty, the cases may have been decided largely on the fact that the property was invested in England; it might require clear proof of change of domicil to prevent assets being liable to duty: *Re Capdevielle* (7); *Attorney-General* v. *Countess of Wahlstatt* (8); *Drevon* v. *Drevon* (9).

Serjeant Jellett, Q.C., in reply:—

The plaintiff's domicil of origin both by birth and parentage was British. On her return to this country with her husband, E. C. Davis, it revived. The case of the *Attorney-General* v. *Fitzgerald* (2), relied upon by the defendants, arose on a conflict between two domicils of choice, and related to a question of legacy duty depending on domicil, and as the legacy duties at that time payable in England differed from those then payable in Ireland it was necessary for the purpose of revenue to preserve the distinction between English and Irish domicil. But the Act 5 & 6 Wm. 4, c. 54, is a common municipal law equally applicable to both countries; and a return to any part of the United Kingdom where that law prevails will revive the domicil of origin, and in any view the plaintiff's domicil of origin would have revived when she left Ireland in 1882.

In 1889 the plaintiff disposed of the unsold portion of her husband's property in America, and all that she retained, except some personal chattels of small value, was situate in the United Kingdom. No case has been cited in which a domicil of origin has been lost by residence as a temporary visitor in a foreign country.

The case, so far as it depends upon the domicil of M'Andrew,

(1) 9 Moo. P. C. C. 325.
(2) 3 Drew. 610, 616.
(3) 3 H. & N. 594.
(4) L. R. 10 Eq. 589.
(5) L. R. 17 Eq. 78.
(6) 14 P. D. 15.
(7) 2 H. & C. 985.
(8) 3 H. & C. 374.
(9) 34 L. J. (N. S.) Ch. 134, 139.

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is completely covered by the language of Lord Chelmsford in *Moorhouse* v. *Lord* (1), depending, as it does, in no way on the mistaken principle of *exuere patriam* which infected the judgment of Lord Cranworth. "The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making it a temporary home though for a period indefinite and contingent, and even if such residence should continue for years, the same intention to terminate it being continually present to the mind, there is no moment of time at which it can be predicated that there has been the deliberate choice of a permanent home." The defendants endeavour to escape from the application of these principles by alleging the intention of M'Andrew to have been indefinite, using that term in an equivocal sense. But the intention of M'Andrew *in point of purpose* was never indefinite as the evidence shows, and the observations of Lord Chelmsford establish that inability to fix the exact period at which the *animus revertendi* will be carried out, or *indefiniteness in point of time* for the completion of the purpose, is unnecessary. His intention as proved was ultimately to live and die in England. That is the test applied in *Bell* v. *Kennedy* (2), and unless there is an intention to acquire a residence in a foreign country, with the intention of permanent and indefinite residence, the domicil of origin is not abandoned: *Re Capdevielle* (3). *Re Steer* (4), does not apply: there the testator in his will stated that he had been made a burgher of Hamburg, and that it was his intention to return there. Every fact in the case showed an intention to live and die in Hamburg. In *Aikman* v. *Aikman* (5) Lord Cranworth, in his judgment, p. 874, stated that the use of such expressions as "home" had little weight in determining the question of domicil. *Jopp* v. *Wood* (6), which in its facts exactly

(1) 10 H. L. Cas. 285.
(2) L. R. 1 H. L. Sc. 307, 390.
(3) 2 H. & C. 985.
(4) 3 H. & N. 594.
(5) 3 Mac Q., H. L. C. 854.
(6) 4 De G. J. & S. 616

resembles the present case, establishes that domicil of origin can only be changed *animo et facto*, and that residence alone, though decisive as to the *factum*, is equivocal as to the *animus*. *Stanley* v. *Bernes* (1) can scarcely be relied on, as no reasons are given for the decision. *King* v. *Foxwell* (2), which in its facts resembles the present case, supports the plaintiff's contention. In *Drevon* v. *Drevon* (3) there was evidence both ways, and the decision turned on the balance of evidence: *Crookenden* v. *Fuller* (4) was a case of the same character. *Craignish* v. *Hewitt* (5) merely decided that a change of domicil during infancy by the father of the infant does not change the domicil of origin of the infant.

The fact of the marriage taking place in America so strongly relied upon as evidence of a change of this domicil of origin leads to an opposite conclusion. It was because they knew that their domicil was English that the plaintiff and M'Andrew resorted to America for the celebration of the ceremony. If they were domiciled Americans a perfectly valid marriage could have been celebrated in England between them: *Sottomayor* v. *De Barros* (6). To use the fact of marriage as proof of domicil in America, and then to employ the domicil, when so proved, to establish the validity of the marriage is to argue in a circle.

[*Hodgson* v. *Beauchesne* (7) and *The Lauderdale Peerage Case* (8) were also referred to.]

WALKER, C.:—

1895.
Feb. 14.

The plaintiff in this action, who describes herself as Emily Davis, seeks a declaration that she is entitled in possession to the income of her late husband's residuary estate. Under the will of her husband, Edward Campbell Davis, who died on the 1st January, 1871, that residuary property was held in trust (in the events that happened) for the plaintiff, so long as she lived his widow and unmarried, and after her decease or marriage upon trust for the Governors of the Bluecoat Hospital in this city, who are the respondents in this appeal.

(1) 3 Hagg. 373.
(2) 3 Ch. Div. 518.
(3) 34 L. J. (N. S.) Ch. 129.
(4) 1 Sw. & Tr. 441, 450.
(5) [1892] 3 Ch. 180.
(6) 5 P. D. 94.
(7) 12 Moo. P. C. C. 285.
(8) 10 App. Cas. 693.

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In February, 1891, the plaintiff, who was then in her fifty-sixth year, and who had, as will appear, lived in Staten Island, in the State of New York, for twenty-nine years, was contemplating marriage with James C. M'Andrew, who had been the husband of her deceased sister; and she came from America to London, and entered into negotiations with the Governors for the sale to them of her defeasible life interest. James C. M'Andrew, who was in London at the same time, and who had lived in Staten Island for thirty-nine years, was assisting her in her correspondence with the Governors. The negotiations became abortive in June, 1891, and in that month she went back to America, and on the 24th June, 1891, went through a ceremony of marriage with James C. M'Andrew, according to the forms of the Protestant Episcopal Church. They lived together as man and wife, and continue to do so. She, however, now asserts in this action, and James C. M'Andrew aids her in the attempt by his evidence, that though the marriage of the 24th June, 1891, was and is in America valid, yet it is, according to the law of this country, invalid and void; and therefore that she is still, in contemplation of law here, the widow of Edward Campbell Davis, and unmarried. If that be, in the eye of the law, the plaintiff's *status*, it is conceded by the respondents' counsel that she is entitled to the declaration she seeks. It is further conceded that the validity of the ceremony performed on the 24th June, 1891, depends on whether the plaintiff and James C. M'Andrew, or either of them, had on that day an English domicil. If both were domiciled Americans, the marriage was admittedly valid, and the plaintiff fails. The sole question, therefore, which we have to determine, is the then domicil of each. Domicil is a question of fact; but for the ascertainment of it, certain legal rules must be borne in mind and applied.

In considering the case, it is of course to be remembered that if either the plaintiff or James C. M'Andrew had in 1891 an American domicil, it was an acquired domicil, a domicil of choice, that the domicil of origin of each was English, and that the *onus* lies on the respondents, who assert a change. The domicil of origin remains a fixed attribute, till a new and different one takes its place, in other words, until there is an acquisition of a domicil

of choice. But it is not thereby extinguished; it revives whenever the domicil of choice ceases, and does not require to be regained in the manner necessary for the acquisition of a domicil of choice. Where the conflict is, as in this case, between the domicil of origin and a domicil of choice, there must be found or inferred an intention to abandon the one and acquire the other; but I think there are decisions, of which *Moorhouse* v. *Lord* (1) is the leading one, which lay down stricter rules for the ascertainment of that intention, and therefore the determination of "domicil," than have been applied in more modern cases, or in cases which preceded *Moorhouse* v. *Lord* (1). I do not think it necessary to include, in those earlier cases, those which related to Anglo-Indian domicil. They were founded on peculiar considerations. The principle of them has been quarrelled with, but it has ceased to be of practical application. For instances of the cases before *Moorhouse* v. *Lord* (1), I may refer to *Munro* v. *Munro* (2); *Forbes* v. *Forbes* (3); *Hoskins* v. *Matthews* (4); *Whicker* v. *Hume* (5); and *Aikman* v. *Aikman* (6).

In *Munro* v. *Munro* (2) Lord Cottenham states the rule as follows:—"The domicil of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil, and acquiring another as his sole domicil. To effect this abandonment of the domicil of origin, and substitute another in its place, it required *animo et facto*, that is, the choice of a place, actual residence in the place then chosen, and that it should be the principal and permanent residence, the spot where he had placed *larem rerumque ac fortunarum suarum summam*. In fact, there must be both residence and intention. Residence alone has no effect, *per se*, though it may be most important as a ground from which to infer intention."

In *Whicker* v. *Hume* (5) Lord Cranworth says: "By domicil we mean home, the permanent home."

Lord Campbell, in *Aikman* v. *Aikman* (6), discusses the question of the effect on domicil of an intention to return to the native

(1) 10 H. L. Cas. 272
(2) 7 Cl. & Fin. 876.
(3) Kay, 341.
(4) 8 De G. M. & G. 13, 26.
(5) 7 H. L. Cas. 124.
(6) 3 Mac Q., H. L. C. 854.

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country, where such intention is attributable to an undefined and remote contingency, and to one reasonably certain. He says:—"If a man is settled in a foreign country, engaged in some permanent pursuit requiring his residence there, a mere intention to return to his native country on a doubtful contingency, will not prevent such a residence in a foreign country from putting an end to his domicil of origin. But a residence in a foreign country for pleasure, lawful or illicit, which residence may be changed at any moment, without the violation of any contract or any duty, and is accompanied by an intention of going back to reside in the place of birth, or the happening of an event which in the course of nature must speedily happen, cannot be considered as indicating the purpose to live and die abroad."

The case of *Moorhouse* v. *Lord* (1) was an appeal from the decision of Vice-Chancellor Kindersley in *Lord* v. *Colvin* (2). The decision in both Courts was the same, and it would serve no purpose to examine the evidence on which the conclusion was arrived at that Dr. Cochrane retained his Scotch domicil of origin. The case derives its importance from the criticisms of the definition of domicil given in the Court of the Vice-Chancellor, and the observations of the Law Lords as to what is necessary to prove the intention of abandoning the domicil of origin. The Vice-Chancellor says (at page 376 of 4th Drewry):—"I would venture to suggest that the definition of an acquired domicil might stand thus: 'That place is properly the domicil of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special or temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home.'"

Moorhouse v. *Lord* (1) was decided in March, 1863; and at p. 282 of the report in 10 House of Lords Cases, Lord Cranworth says:—"For all, or some, or one of those motives, he quitted Clippens. He went first to Berne, where he sent his children to a school at Hoffwyl for a few months, and went to Paris, and

(1) 10 H. L. Cas. 272. (2) 4 Drew. 376.

eventually established himself in a house or apartments which he took unfurnished, and for which he got expensive furniture, meaning, if you please, to live there always. But that does not change the domicil. In order to acquire a new domicil, according to an expression which I used on a former occasion, and which I shall not shrink on that account from repeating, because I think it is a correct statement of the law, a man 'must intend *quatenus in illo exuere patriam.*'" And Lord Chelmsford, at p. 285, referring to the Vice-Chancellor's definition, says:—"Now this definition, and that of the Vice-Chancellor, appear to me to be liable to exception, in omitting one important element, namely, a fixed intention of abandoning one domicil, and permanently adopting another. The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event, upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent; and even if such residence should continue for years, the same intention to terminate it being continually present to the mind, there is no moment of time at which it can be predicated that there has been the deliberate choice of a permanent home."

Thus there entered into the acquisition of domicil a very strict rule, namely, such a proved intention to change, and proved intention to assume a different *status*, as would involve on the part of an Englishman the intention to become a Frenchman, and *vice versa*. A remarkable instance of the colouring which *Moorhouse* v. *Lord* (1) gave to subsequent decisions is to be found in *In re Capdevielle* (2). Martin, B., there says, dealing with the case before him:—"I think it the true and fair inference from the affidavits that, during the whole time, his mind and intention was to return to France and die there, although he never determined or fixed upon any period when his return should take

(1) 10 H. L. Cas. 272. (2) 2 H. & C. 985, 1009.

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place; and that he was living in Manchester with the intention of remaining there for an indefinite period, but during all the time he had the hope, expectation, and intention of returning to France and there ending his life; that he always deemed and considered himself to be a Frenchman, and not an Englishman." But he then refers to *Moorhouse* v. *Lord* (1), and says:—"Lord Cranworth clearly indicates that the old view as to domicil was not correct, and that modern improved views existed." Bramwell, B., was not satisfied with the expressions used in *Moorhouse* v. *Lord* (1). He says:—"Every definition, except one, of the word 'domicil' would comprehend this case, and render the testator domiciled in England; and all the authorities relating to Anglo-Indian domicil point in the same direction. The only authority to the contrary is the decision of the House of Lords in *Moorhouse* v. *Lord* (1)." He says the propositions used there were far too extensive. "Assuming those noble and learned Lords intended to overrule previous cases, I have great difficulty in supposing that they intended everything which would be comprehended within the very extensive expressions they used."

We were also pressed with the authority of *Jopp* v. *Wood* (2) as a decision directly in point; and therefore I have carefully examined it. In that case the question was the domicil of Mr. Smith, who went to India in 1805, and died in 1830 at Calcutta. His domicil of origin was Scotch; but in 1819 and 1820 he would appear to have lived in England. Up to 1814 there was no expression of intention either way; but "for the last sixteen years of his residence in India," the Court says, "his intention of returning to Scotland, in my opinion, is clearly expressed." That is the language of the Master of the Rolls. He then refers to the cases on Anglo-Indian domicil: *Bruce* v. *Bruce* (3); *Munroe* v. *Douglas* (4); *Craigie* v. *Lewin* (5); and *Forbes* v. *Forbes* (6), which he treats as having settled the rule as to officers and covenanted servants of the East India Company resident in India; but considers them as exceptions. But he doubts if the inference of

(1) 10 H. L. Cas. 272.
(2) 34 Beav. 88.
(3) 2 B. & P. 229.
(4) 5 Mad. 379.
(5) 3 Curt. 435.
(6) 25 L. J. (N. S.) Ch. 724.

intention from the nature of the duties to be performed "can fairly be presumed in the case of a man who goes abroad to acquire a fortune in the best way he can, so as to make this inference so overwhelming as to control and override the strongest expressions of a contrary intention." He says:—"I find that the father of the infants always intended to return to Scotland, and never intended to make India his home." On appeal (4 De Gex, J. & S. 626) Knight Bruce, L. J., says:—"He resided in India while there, for the mere purpose of his private business, and appears also to have retained the wish and intention of returning finally to Scotland. His correspondence and conduct appear to prove that distinctly. A permanent residence in India seems never to have been in his contemplation." Turner, L J., says:—"Long residence does not of necessity show that he has elected that place as his permanent and abiding home." He regards the purchase of land in connexion with the Indian business, and retaining his house in Calcutta during a temporary visit to Great Britain, as of little weight; and having intimated that, without the evidence on which he afterwards relies given by the respondents, he would have felt little doubt, he goes into it and says:—"These are facts which, in my judgment, conclusively show that Mr. Smith, so far from having abandoned his domicil in Scotland, which it is to be observed was his domicil of origin, and therefore not so readily to be considered as abandoned as an acquired domicil, desired at all times to retain it."

That case assumes the constant and present existence of an intention to return to Scotland from India. In *Bell* v. *Kennedy* (1) the question arose, as here, during the life of the party, because Mr. Bell contended that on the 28th September, 1838, when his wife died, his domicil was still what his domicil of origin was, Jamaica. The test put by the Lord Chancellor was this: "Whether the appellant, before the 28th September, 1838, the day of the death of his wife, had determined to make, and had made, Scotland his home, with the intention of establishing himself and his family there, and ending his days in that country. It is probably the case that the intention of dying in a place is

(1) L. R. 1 H. L. Sc. 307.

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involved in the intention of taking up a residence there for an indefinite time." Lord Westbury says:—"Now, this case was argued at the bar on the footing that as soon as Mr. Bell left Jamaica he had a settled and fixed intention of taking up his residence in Scotland; and if, indeed, that had been ascertained as a fact, then you would have the *animus* of the party clearly demonstrated. The *factum* which alone would remain to be proved would, in fact, be proved, or at least would result immediately after his arrival in Scotland."

Now, when we come to consider the case of the plaintiff, it will be seen whether there are not grounds for attributing to her the fixed and settled intention of taking up her residence in America when she finally left Ireland in 1882.

The case of *Udny* v. *Udny* (1), heard on the 3rd June, 1869, has, ever since it was decided, been treated as the leading authority on what constitutes a domicil of choice taking the place of a domicil of origin. It is there pointed out that the expressions used in *Moorhouse* v. *Lord* (2) as to the intent *exuere patriam*, or to become a Frenchman instead of an Englishman, are calculated to mislead, and go beyond the question of domicil. The well-known passage in Lord Westbury's judgment must be constantly kept in mind in dealing with the evidence in the present case. He says (at p. 458):—"Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with the intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil and not a definition of the term. There must be a residence freely chosen and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness, and it must be a residence fixed, not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence, originally temporary or intended for a limited period, may afterwards become general and unlimited; and in such a case, so soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicil is established.

(1) L. R. 1 H. L. Sc. 441. (2) 10 H. L. Cas. 272.

That decision, I think, marks the departure from the stricter ideas as to the constitution of domicil which appear in the observations used by the noble and learned Lords in *Moorhouse* v. *Lord* (1), and which pervade the decisions in the interval between *Moorhouse* v. *Lord* (1) and *Udny* v. *Udny* (2). The test there laid down by Lord Westbury was adopted by Vice-Chancellor James in *Haldane* v. *Eckford* (3). The conflict there was between a Scotch domicil of origin, regained after a residence in India, and a Jersey domicil of choice, and the decision was in favour of the Jersey domicil. Vice-Chancellor James says the decision in *Udny* v. *Udny* (2) differs from *Moorhouse* v. *Lord* (1) and the Exchequer cases; but he proceeds:—"It differs in bringing back the law to that which, in my opinion, was always before those cases considered to have been the law, and evidently is the law as laid down by the treatise writers, viz. that domicil was to be considered as changed whenever there was a change of residence of a permanent character voluntarily assumed."

Vice-Chanceller Wickens, in *Douglas* v. *Douglas* (4), applies the same test, though on the facts he decided in favour of the domicil of origin. He says (at p. 644):—"It seems to me, as it did to Vice-Chancellor James in *Haldane* v. *Eckford* (3), that the intention required for a change of domicil, as distinguished from the action embodying it, is an intention to settle in a new country as a permanent home, and that if this intention exists, and is sufficiently carried into effect, certain legal consequences follow from it, whether such consequences were intended or not, and perhaps even though the person in question may have intended the exact contrary."

Doucet v. *Geoghegan* (5), in the Court of Appeal, is the next case. There the Court decided that the testator had acquired an English domicil; and one of the main facts relied on was that he had twice married in England in a manner not conforming to the formalities which are required by the French law for the legalisation of marriages of Frenchmen in a foreign country. Sir George Jessel (at p. 456) quotes, with approval, the language of Dr.

(1) 10 H. L. Cas. 272.
(2) L. R. 1 H. L. Sc. 441.
(3) L. R. 8 Eq. 631.
(4) L. R. 12 Eq. 617.
(5) 9 Ch. Div. 441.

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Lushington in *Hodgson* v. *Beauchesne* (1), in which he says:—"We think that length of residence, according to its time and circumstances, raises a presumption of intention to acquire domicil. The residence may be such, so long and so continuous, as to raise a presumption nearly, if not quite, amounting to a *presumptio juris et de jure*, a presumption not to be rebutted by declarations of intention or otherwise than by actual removal." Lord Justice James says:—"Both his marriages were acts of unmitigated scoundrelism, if he was not a domiciled Englishman. He brought up his children in this country; he made his will in this country, professing to exercise testamentary rights which he would not have if he had not been an Englishman. Then with respect to his declarations, what do they amount to? He is reported to have said that when he had made his fortune he would go back to France. A man who says that, is like a man who expects to reach the horizon and finds it at last no nearer than it was at the beginning of his journey. Nothing can be imagined more indefinite than such declarations. They cannot outweigh the facts of the testator's life." Lord Justice Brett gives judgment to the same effect, and gives a definition of "permanent residence" more extensive than either of the two judges who preceded him. He says:—"The definition of permanence is that it is not only for a period, either for a definite time or for a time limited by a condition."

The last reported decision is *In re Craignish* (2), by Mr. Justice Chitty, and affirmed by the Court of Appeal. The question there was the domicil of the plaintiff's wife at her death on 10th April, 1889, which depended on whether the plaintiff was then a domiciled Scotchman; and he gave evidence on his own behalf, with the view of showing that he had not lost his Scotch domicil of origin, but it was held that he had acquired, and at the material date had, a domicil of choice in England. Mr. Justice Chitty says (at p. 192):—"A man may be, in fact, homeless, but he cannot in law be without a domicil subject to this distinction, the term 'home' in its ordinary popular sense is practically identical with the idea of domicil. Living in lodgings

(1) 12 Moo. P. C. C. 285. (2) [1892] 3 Ch. 180.

and changing the lodgings from time to time are circumstances to be taken into consideration on a question of domicil. They are not inconsistent with domicil. There are many foreigners resident and domiciled in this country, who pass their lives in lodgings only; a man may be domiciled in a country, without having a fixed habitation in some particular spot in that country. The plaintiff's lodgings or apartments were all within the area of London"—observations which answer the argument addressed to us upon the fluctuating character of the home of Mrs. Davis after she went back to America in 1882. I observe that expression "permanent home," which Mr. Justice Chitty there uses, has been repeated by him in a case reported since the argument of this case, *In re Garden* (1), in which he says: "the evidence was insufficient to support a change of residence in Paris *de facto*, or anyhow was insufficient to establish an intention to settle there as a permanent home."

The test, therefore, which I think should be applied to the present case when considering the evidence is, whether on the 24th June, 1891, each of the parties had adopted America as a permanent residence, without any such intention of returning to England as was not too indefinite to outweigh acts. It is obvious that as the word "indefinite" has no fixed legal meaning, every case must depend on its own special facts.

Take first then the domicil of the plaintiff. Her maiden name was Emily Cuthbertson. She was born in England, on 11th September, 1835. In 1838 her father and mother went to America, bringing with them the plaintiff and two other children, also infants. Mr. Cuthbertson established himself in business in Staten Island as a wholesale wine and spirit merchant, and he lived in Staten Island till his death in 1866. Five other children were born in America. The plaintiff was educated in America, she came of age in 1856, and in 1858 she married Edward Campbell Davis, a son of Joseph John Davis with whom he had been in partnership. In 1859 Joseph John Davis and his wife Anne went over to Ireland, and in 1860 he took a lease of property in Kenilworth-square, Rathmines, the head-rent of which he afterwards bought.

(1) 11 *Times* Rep. 167.

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The plaintiff and her husband lived on in America, at Staten Island, till 1864, when they also went to Ireland, where they lived, partly in lodgings and partly in the house of Joseph John Davis. Joseph John Davis died in Ireland in 1864, and Edward Campbell Davis also died there in 1871. I assume they both died domiciled Irishmen. After the death of Edward Campbell Davis, the plaintiff lived on in Ireland, with her mother-in-law, Anne Davis, till the death of the latter on the 22nd April, 1881, but meanwhile paid visits to America to her relatives there. She remained in Ireland till the affairs of the Davis family were wound up, when her position was this, she was entitled for her life, or till marriage, to the income of property vested in trustees consisting partly of investments on securities and partly of house property. She was also, by gift from her husband confirmed by his will, the owner of real estate in Staten Island and she was possessed of chattels and family pictures. She went out to America in 1882, bringing the chattels and pictures with her and all property capable of being removed.

There was considerable argument whether by living in Ireland she reverted to her domicil of origin. I do not think the question material, because when she left Ireland for America she, in law I think, regained her domicil of choice; but there are in many cases important distinctions between an English and Irish domicil, for instance, in *Attorney-General* v. *Fitzgerald* (1) the conflict was between those two domicils on a question of legacy duty claimed in respect of an Irish charity. She had no English property or associations; all her relatives were in America. The date of her mother's death is now fixed to be the 24th April, 1876. One sister, Julia, had been married in 1858 to James C. M'Andrew and they lived in Staten Island. The plaintiff's brothers lived and were established there, and her sisters were living in the family house at Staten Island. She travelled occasionally with her sister, Alice, and in May, 1884, being at Geneva, she was summoned to London to attend the deathbed of her sister Julia M'Andrew. She then went back to America. She approved of and executed deeds in America in 1883 and 1884; and in 1887 she went to reside in the house of

(1) 3 Drew. 610.

her brother-in-law, Mr. M'Andrew, at Staten Island, where she principally lived till 1891, looking after his house and his unmarried daughters, the last of whom married in January, 1891.

Her position from 1882 to 1891 will be best derived from the evidence given. James M'Andrew says:—"From the time she was in my house it was always as a member of my family. When she was in America she made my house her home. She had her sisters; they were living within three miles of us. My house was her head-quarters when she was there." The plaintiff says:—"My sister Julia died in London in Victoria-street; I was at the time in Geneva, and they sent for me; I had spent a good deal of time on the Continent with my unmarried sister after my husband's death; I paid visits to America also; I went home to my mother's house" (evidently treating it as the family home). She also says:—"When I left Kenilworth-square in 1882 I went to my father's house in Staten Island. That was my home then. From that time to my marriage I made that my head-quarters except when I was travelling. In April, 1884, I was living in Staten Island at my mother's; my father was dead. When I left this country in 1882 I left behind me no property that I could take away with me; I went to a country where all my relatives were. In 1891 I had heard that a marriage with a deceased sister's husband would not be legal. In our country it is legal; in America it is legal. I supposed I had forfeited my rights under the will by marriage with Mr. M'Andrew."

In 1889 she sold Annefield, the place in Staten Island, for 11,750 dollars. In January, 1891, when the last daughter of Mr. James C. M'Andrew got married, she found she could not remain in the house as she was, and a marriage was contemplated. She came to London in February, not with the view of remaining there but intending to return when she accomplished her object. Mr. M'Andrew was also there advising her. On the 11th February, 1891, she offered to sell her life estate to the Hospital. The negotiations went on till June. Probably the Governors concluded that she contemplated marriage; and in June the negotiations were broken off; she left England in June and arrived in America on the 21st, met Mr. M'Andrew by appointment on the 22nd, and got married to him in Staten Island on

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the 24th June, 1891. After the marriage they acted on the assumption that she had forfeited her life interest by marriage; but it appears that in July, 1892, she got advice which led to this action, founded on the assertion of an English domicil in her or Mr. M'Andrew.

What, then, was the plaintiff's domicil on the 24th June, 1891? It is true she had from 1882 to 1887 no house of her own in America, where she lived, but that is only a circumstance to be considered. Mr. Justice Chitty points this out in *In re Craignish* (1). It is remarkable that she was not asked whether she ever intended to return to England or Ireland, though she was asked as to declarations of intention on the part of Mr. M'Andrew. When her associations with Ireland were severed by the deaths there of her husband's relations, she carried back to America all the portable property she was possessed of. She had no associations whatever with England. She went back to the country in which she had lived from infancy, where she was educated and married, had spent twenty-six years, and where her friends and relations lived. It is true we must find or infer an intention to abandon her English domicil of origin and take up a permanent residence in America as her home; but I think in weighing the evidence it is a legitimate subject of consideration that she left England an infant of three years old; and when the Master of the Rolls says in his judgment that she had but technically an English domicil, it is obvious he meant his observation in that sense, and was so understood by those who heard him. As regards the plaintiff I agree with the Master of the Rolls that, on the 24th June, 1891, her domicil was American.

The case of Mr. M'Andrew remains, which is more debatable. James C. M'Andrew was born in London in 1827. In 1852 he went out to America; he had been connected with the firm of M'Andrew & Co. in London and Liverpool. He acted in New York as agent for the London house, and also as commission merchant on his own account, dealt in dried fruits and products from Spain, and sold liquorice paste. He also had an emery factory on his own account which he had taken a lease of. In 1858 he mar-

(1) [1892] 3 Ch. 180.

ried Julia Cuthbertson by whom he had several children; one who married Mr. Shepperd; another who married Mr. Crooks, and a third married in London. He was in the habit of going to England about once a year, living in lodgings there, but he once took a house there for the education of his children at the School of Art. In May, 1876, he obtained an Act authorising him to purchase real property in the States. He had a business establishment at Water-street, and he first lived at Clifton, Staten Island, and afterwards moved to Middleton, where he bought property. On four occasions he made purchases for the purpose of adding to his place at Middleton, the last being on 23rd December, 1890, six months before his marriage with the plaintiff; he also owned some property at Graigue's Hill. He constantly spent money in improving his place; once it was burnt down, and he rebuilt it. On the 30th June, 1879, he bought the fee of his business premises. He spent about £15,000 in the purchase of fixed property in America; his establishment at Middleton was very extensive. There were between seventy and eighty acres of ground, and he had there a number of horses and a large staff of servants; he had also shooting and fishing in Canada where he used to go for a couple of months in the year. The turn-over of his business was about a million of dollars a-year. In 1887 he gave up the commission business, but he retained the emery factory, and he made a lease of his business premises for £600 a-year. He attended the church of Mr. Eccleston at Staten Island, and was there married by him in 1858, and also to the plaintiff on 24th June, 1891. Mr. Eccleston was a clergyman of the Protestant Episcopal Church. After the marriage the plaintiff wrote to Mr. Adair, who had acted in connection with her husband's estate in Ireland —"I have no doubt you and Mrs. Adair will be somewhat amused at my prompt decision and action, and may think in giving up my income I have acted hastily, but this is not so. I am perfectly aware of the consequence of my step, and am satisfied to abide by it. I shall be well cared for during my husband's existence, and should I survive him, am amply provided for."

In July, 1892, they were advised that there was a question depending on their domicil as to whether the life estate had been really forfeited. They came to England, and the place at Staten

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Island was shut up, though still retained; and in 1893, after action brought, Mr. M'Andrew bought a place in Surrey for £20,000; the contract of sale was not entered into till after action. Mr. M'Andrew was examined on his own behalf at the trial, and he stated that he always intended to return to England. Witnesses were also examined on commission, who deposed to declarations of intention made by him; and the case of Mr. M'Andrew was in great part rested on that evidence. Portion of this evidence consists of statements by a witness of impressions formed from conversations with Mr. M'Andrew, in which he expressed strong English views, asserted English superiority, and declined to become a naturalised American on the ground that he was English; and that he always said, when he went to England, "I am going home." But it has been pointed out in several cases that such use of the word "home" is a natural one by a settled colonist, when speaking of the mother country. A witness (Mr. Watson) states that he always said "when he got older, and through with all his business here, he would go back home to England." He says he heard him make that statement many times; he fixed no definite time; he said "when he had made his fortune." Mr. White who was examined at considerable length, says—"I only remember specifically that he has at times stated that he would ultimately return to England to die in the home of his fathers; he did not say when he would return; he simply said he would return at some time; he did not fix a date." Both this witness and Mr. Watson appeared to have had recent conversations with Mr. M'Andrew. Mr. White was asked, "Did he say what he wanted you to say about his intentions?" (*Answer*), "Simply that he knew that I knew that it was his intention to return to England to die there." All these declarations, so far as they are evidence at all, or can be deemed accurate, seem to me both vague and indefinite in character. Evidence of this class has been frequently given in cases where the question involved was domicil; but it has been repeatedly said by eminent Judges that where such declarations have been unaccompanied by acts, they constitute the lowest species of evidence, and cannot be allowed to outweigh acts. See *Hodgson* v. *Beauchesne* (1); *Hoskins* v. *Mathews* (2);

(1) 12 Moo. P. C. C. 325. (2) 8 De G. M. & G. 26.

Attorney-General v. *Fitzgerald* (1); *Crookenden* v. *Fuller* (2); *Drevon* v. *Drevon* (3); *Doucet* v. *Geoghegan* (4).

As to the evidence of Mr. M'Andrew himself, considering the position in which he comes forward, and the interest he has at stake, I think it would be accepted with much reserve, and only when corroborated. In *Bell* v. *Kennedy* (5), and *Re Craignish* (6), the question of domicil arose, as here, during the life of a witness interested. I adopt the criticisms on such evidence of the Lord Chancellor at p. 313 of L. R. 1 Scotch Appeals, and of Mr. Justice Chitty, at page 190, [1892] 3 Chancery.

Upon the facts which I have stated, I am prepared to hold that the domicil of each in June, 1891, was American. But there are other considerations which I do not think should be lost sight of, though counsel for the respondents did not attach as much weight to them as I am disposed to give. I mean the acts of the parties, antecedent to and connected with the marriage itself. I agree that the fact of marriage does not *per se* determine domicil; but every circumstance in conduct connected with the marriage can be considered in the ascertainment of domicil. Both the parties were in England in February, 1891; and the plaintiff was endeavouring to buy off the impediment to the holding of her life estate on the forfeiture consequent upon a marriage legal in England and Ireland. Such a marriage the plaintiff was, I think, determined upon, but, if possible, freed by this negotiation from its consequences. The negotiation failed, and she accepted the alternative —marriage in America with a resident American. The letters in effect actually state the acceptance of this alternative, and her conduct is based on the assumption that she was remitted to such a *status*. I have already referred to what she wrote before the marriage:—"I am perfectly aware of the consequence of my step, and am satisfied to abide by it," and there is a remarkable passage in a letter of Mr. M'Andrew, written after the marriage, where he refers to the transactions antecedent to it, as follows:—"Judging the door to be finally closed to her, Mrs. Davis returns to America and gets married." It is the common case that they desired to

(1) 3 Drew. 610.
(2) 1 Sw. & Tr. 450.
(3) 10 Jur. (N. S.) 717.
(4) 9 Ch. Div. 441.
(5) L. R. 1 H. L. Sc. 307.
(6) [1892] 3 Ch. 180.

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solemnise a marriage which would be valid all the world over, and that they supposed they were going through a ceremony legal everywhere. They chose America as the place of marriage, and as their married home, and the correspondence shows they solemnised it with the belief that it had attached to it all the legal consequences of validity; and this was a state of mind existing before the marriage. Suppose there were a child born, and the issue was its legitimacy, would not, on this debatable question of fact—the domicil—great force be attributed, against their now declarations, to conduct, which, assuming a state of law only reconcilable with American domicil, would make truthful the solemn declaration of each in the marriage service that they knew of no impediment to lawful matrimony, a statement only consistent in law with the belief in and avowal of an American domicil.

Upon the whole case, I am of opinion that the appeal is unsustainable, and should be dismissed with costs.

SIR P. O'BRIEN, C.J.:—

For the purpose of my judgment I assume that Emily Davis, when she left Ireland for America in 1882, had an English domicil of origin; and I take it to be well established law that a person who alleges change of domicil must prove it, that the burden of proof lies upon the person who alleges a new domicil has been acquired; and I think it is equally well established that domicil of origin adheres more closely than domicil of choice, and that to establish its abandonment, and the acquisition of a new domicil, there must be clear and satisfactory evidence.

Accepting these propositions, I ask, who was the plaintiff, Emily Davis, when she left Ireland for America, in 1882? She was a lady in reference to whom, so far as related to all personal ties, the last link had been broken on the death of her first husband. To use her own language, when she left in 1882, she went to a country where all her relations were, she had no relations here. She was going to a country where her early life had been spent —she passed from the age of three to the age of about thirty there —she married in America. America had been the home of her parents: they lived and died there. She returned to America to the very house where her father and mother lived, to that place

which had been undoubtedly her early home, and which was likely to be endeared to her by early associations, the abiding impressions of youth and the memory of her parents. What else have we? That her sisters continued to live in that which had been the common home of parents and children. This was the place this lady went to. What more likely place to make her home? Everything combined to make her select America as her home; her present solitary condition, the associations of the past, the convenience of the present, the society of her nearest, indeed of her only, relatives. But what does this lady herself tell us this place was? She uses the expression "it was my home." The effect of this expression is sought to be minimised by comparing it with an expression found in another case, to which the House of Lords attached little or no weight. The case I refer to is *Beli* v. *Kennedy* (1) where it was proved that a person when speaking of returning to England from Jamaica used the words "coming home." The Lords did not attach any weight to this expression, because the expression "home" in the sentence I have referred to, meant "England." "England" and "home" were convertible terms; that is to say, the word "home" was used by people resident abroad to describe England. It did not import and could not import in that case the idea of residence. It was, as Lord Cairns said, obviously a form of language that would be used by a colonist in Jamaica speaking of the mother country in contradistinction to the colony. Very different is the expression "*my* home," which does import residence, and permanent residence; and this is the more clearly shown by the expression which the lady used in connection with the words "my home," viz. "my head-quarters." It was no casual use of the word "home." I emphasize the word "casual" because in another case, *Aikman* v. *Aikman* (2), Lord Cranworth says its casual use, when applied to a country, is not of importance; but here the expressions "my home" and "my head-quarters" were used not casually, but deliberately in direct reference to residence. "Head-quarters" means in its ordinary acceptation principal place of residence; and "Domicil of choice," says Lord Westbury in *Udny* v. *Udny* (3), "is a con-

(1) L. R. 1 H. L. Sc. 307. (2) 3 MacQ., H. L. C. 874. (3) L. R. 1 H. L. Sc. 457.

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clusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with the intention of continuing to reside there for an unlimited time." It must not, too, be lost sight of that no evidence was adduced of any intention on the part of this lady, who had described America as her home and "head-quarters" to return to the United Kingdom. In another case I would not attach any importance to this omission; but in this case much weight was sought to be attached to somewhat vague expressions of intention on the part of Mr. M'Andrew to return to reside in England when he had realised a fortune in America. Mr. M'Andrew himself was asked with reference to this, and witnesses including the plaintiff, Emily Davis, were produced to swear to conversations which it was contended evidenced such an intention. The fact that evidence of this sort was pressed with much insistence in the case of Mr. M'Andrew and was not, though the case is one and the same, attempted in any way in the case of Mrs. Davis, is not without at least some significance. The plaintiff was asked as to Mr. M'Andrew's intentions; she was not asked as to her own.

There was another circumstance also which showed that her departure for America was intended by her as a final severance of all permanent connection with the United Kingdom. She said in her evidence that when she left this country in 1882 she left behind her no property she could take with her. These are her very words, and in reference to this matter Mr. Adair says that the lady took with her to America a great many things. Amongst the things she so took were pictures and china. The house that she lived in with her mother-in-law was sold. No residence remained for her in Ireland. It is plain to my mind, whether we regard the occasion of the lady going to America, the circumstances of her departure, the place she was going to, the fact of her taking everything she could take with her, the fact that in this particular case no evidence was given of any intention on her part to return to reside in the United Kingdom, her description of America as her "home" and "head quarters," and the fact of her residence there, that she abandoned her domicil of origin, and acquired a new domicil of choice in America. All the essential conditions to the acquisition of a new domicil are

fulfilled—intention to abandon the original domicil, intention to reside for an indefinite time in another country, and actual residence with that intention. She resided for some years with her sisters, in the old home of the family in America, and, as Lord Chelmsford said in *Bell* v. *Kennedy* (1), if the intention of permanently residing in a place exists, residence in pursuance of that intention, however short, will establish a domicil. I am absolutely clear that this lady when she left Ireland, was not merely *quærens quo se conferat, atque ubi constituat domicilium*, but that she had resolved—had, to use the language of Lord Westbury, a "settled purpose"—to set up her tabernacle in America, and to make it her future home, and that when she did reside there with her sisters a new domicil was acquired *animo et facto*. In her instance I have no difficulty whatever. Whatever difficulty exists in the case arises, as I ventured to observe during the argument, with reference to Mr. M'Andrew.

With reference to him, putting aside for the moment all evidence as to declarations of intention to return to England, and the fact of his return after his marriage, with which I shall deal later on, I put this question—Suppose Mr. M'Andrew died in the June of 1891, before his marriage, could anyone entertain any substantial doubt that the main facts of his life would be satisfactory evidence of the existence of those conditions which indicate the acquisition of a new, an American, domicil? What are those facts? With the exception of some short occasional visits to England, he had been, before June, 1891, in America for the space of thirty-nine years. To use his own language, he had established himself in business in America in 1852. He had large business undertakings, by which he realised a considerable fortune. He expended some £15,000 in the purchase of land, held in fee-simple, in America. He had a handsome residence in Staten Island—an expensive establishment there. The plaintiff, Emily Davis, says in her evidence that during her sister's married life Mr. M'Andrew was in America, and his home was in America. "The house in which he and my sister lived," she says, "was a very good house, had all the comforts of a luxu-

(1) L. R. 1 H. L. Sc. 307.

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rious house." The land on which it stood was held by him in fee-simple; and he rebuilt it after a fire. He had, as I have already said, established himself in business in America in 1852. He married there in 1858. His married life, with the exception of occasional visits to England, was all spent in America. His children were born, educated, and married in America. To use the words of Lord Cranworth, in *Bell* v. *Kennedy* (1), "There he married, there he had his family, there he set up his *lares*." Having amassed a large fortune, he retired from business in 1887 or 1888, and did not then or before June, 1891, return to reside in England, but continued to live on in Staten Island, and during all this time he had neither home, residence, nor property in England. I attach no importance to the fact that he took lodgings in London when on short visits, or had a house for a short time when his children were taking lessons at the Kensington School of Art. But the facts I have referred to are the main facts in relation to the period he was in America prior to June, 1891—the main facts of the period of thirty-nine years which he spent there in that interval—the interval between the age of twenty-five, when he went to America, and the age of sixty-four, when he married in June, 1891. Those thirty-nine years are the most important part of a man's life. Take any of the tests by which the acquisition of a new domicil is now determined, and is it not clear that Mr. M'Andrew, before June, 1891, acquired an American domicil? Lord Cranworth said, in *Aikman* v. *Aikman* (2), "It is a clear principle of law that domicil of origin continues until another domicil is acquired, *i.e.* until the person whose domicil is in question has made a new home for himself in lieu of the home of his birth." Had not Mr. M'Andrew made a new home for himself during this long lapse of years? In England, house he had none. In America he contracted every relation, whether in reference to property, business, residential establishment, married life, and family, which are associated with the notion of permanent and exclusive home; and with reference to the word "permanent" in connection with the word "home," I would refer to the language of Sir George Jessel, in the case of *Doucet* v.

(1) L. R. 1 H. L. Sc. 307. (2) 3 MacQ., H. L. C. 877.

Geoghegan (1), where he says, "In all cases a difficulty arises as to the meaning of the word domicil, but it evidently implies the intention to make the place one's home, and a home is suggestive of permanency." But take the language of that great master of this and every other branch of the law, Lord Westbury, in *Udny* v. *Udny* (2). He says there:—"Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be a residence fixed, not for a period or particular purpose, but general and indefinite in its future contemplation. It is true that residence, originally temporary, or intended for a limited period, may afterwards become general and unlimited; and in such a case, so soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicil is established."

This is the language of Lord Westbury in what appears to me to be the greatest, the most luminous, and, though not long, the most comprehensive judgment that is to be found in our English law books upon the law of domicil. It has been adopted as laying down the true tests by which domicil has been determined in all subsequent cases, and it corrected in the most lucid language the mistake of Mr. Justice Story, when he confounded civil with political *status*, a mistake founded on the language of Lord Kingsdown in *Moorhouse* v. *Lord* (3).

Applying this test to what I have described as the main facts of Mr. M'Andrew's life, that is to say, of his life before June, 1891, is it not plain that he voluntarily fixed his chief residence in America, with an intention of continuing to reside there for an unlimited time? His residence there was, in my opinion, absolutely indefinite, the word which Lord Westbury uses, and which Lord Bramwell says, in *Re Steer* (4), he prefers to the word

(1) 9 Ch. Div. 441.
(2) L. R. 1 H. L. Sc. 457.
(3) 10 H. L. Cas. 272.
(4) 3 H. & N. 594.

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"permanent." To say that he went to America to make a fortune, and that therefore he went for a particular purpose, is, in my opinion, wholly unsustainable. Lord Westbury illustrates what he means by a particular purpose in the self-same sentence; and to say that being engaged in the multifarious transactions of a great business career is being in America for a particular purpose, as was contended at the bar, is negatived by the illustrations given by Lord Westbury, and indeed by the suggestions of common sense. Nothing, in my opinion, could be more "general and indefinite in its future contemplation" than Mr. M'Andrew's residence in America up to the time of the second marriage in 1891.

I come now to the fact that he did return, after his marriage, to England, and purchased a residence there. I say at once that I can derive no assistance whatever from this fact. The question to be determined in this case, which, of course, if decided against Mr. M'Andrew, would involve considerable pecuniary loss, had arisen in the most acute form; and the fact of his subsequently coming to England, purchasing a residence there, and actually bringing over the furniture of his house in Staten Island, for the purpose of an English residence (which transmission of furniture was indeed a supreme effort) has no weight whatever in my mind in modifying the inferences which I have drawn from the main facts of his antecedent life.

There remains the evidence as to conversations and declarations of intention. Sir Cresswell Cresswell, in *Crookenden* v. *Fuller* (1), says that evidence of conversations and declarations has been, unless where accompanying acts, rightly described as the lowest species of evidence. In *Hodgson* v. *Beauchesne* (2), Dr. Lushington had expressed a similar opinion, and his opinion was referred to and adopted by Sir George Jessel in *Doucet* v. *Geoghegan* (3). But such as it is, let me deal with it. I agree with the analysis of it by the Master of the Rolls in his judgment, and by the Lord Chancellor here. Once the doctrine of *Moorhouse* v. *Lord* (4), that in order to change a domicil a man must intend *quatenus in illo, exuere patriam*, was got rid of by the judgment

(1) 1 Sw. & Tr. 450.
(2) 12 Moo. P. C. C. 285.
(3) 3 Ch. Div. 441.
(4) 10 H. L. Cas. 272

in *Udny* v. *Udny* (1), and that it was shown that the question of naturalisation and allegiance is distinct from that of domicil, most of the evidence as to conversations and declarations by Mr. M'Andrew becomes absolutely nugatory and irrelevant. Mr. M'Andrew, no doubt, had an admiration for England, as a country, for her form of government and her institutions. He refused to become a naturalised American at the the time of the American War, as the Master of the Rolls pointed out, but he procured the means of holding and conferring title to landed property, which to my mind rather indicates an intention to reside in that country. The fact that he acquired the means of dealing with landed interests there showed, in my judgment, an intention to remain and reside there. No doubt there is some evidence that he said he would return to England. Evidence of conversations is said, as I have shown, to be the lowest class of evidence; but it becomes peculiarly low in this case, because we find that Mr. M'Andrew did not return to England when he retired from business in 1887. But what is the effect of that evidence as declarations of intention to return to England? I think it comes to no more than this—that he might return if he made a fortune. A contingency upon a contingency. There is an apposite passage with reference to this in the judgment of Lord Campbell in *Aikman* v. *Aikman* (2). He said:—"If a man is settled in a foreign country, engaged in some permanent pursuit requiring his residence there, a mere intention to return to his native country on a doubtful contingency will not prevent such a residence in a foreign country from putting an end to his domicil of origin." But I think this matter is conclusively set at rest by the case of *Doucet* v. *Geoghegan* (3). In that case a Frenchman was held to have acquired an English domicil, though he had expressed an intention to reside in France when he had acquired a fortune, and the argument in that case was like the argument here. Sir George Jessel, when dealing with it, said:—"The contention here is not that the declarations can be read to show a change back to his original domicil, but to prove that he never intended to acquire a domicil in England. But they are too indefinite for that pur-

(1) L. R. 1 H. L. Sc. 457. (2) 3 MacQ., H. L. Cas. 858. (3) 9 Ch. Div. 441.

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pose. A declaration that a man means to return when he has acquired a fortune is not sufficient to outweigh actions which show an intention of permanent residence." And Lord Justice James added:—"Nothing can be imagined more indefinite than such declarations. They cannot outweigh the facts of the testator's life." Lord Esher said, in the same case:—"It has not been seriously urged that the testator meant to return at the end of twenty years, or of any such fixed period, but it was said that he limited the time by reference to the performance of a condition, namely, of his making a fortune. I think such a condition is not sufficient. It ought to be a condition which limits the residence to a definite time. There can be nothing so indefinite as the time at which a man expects to make his fortune." These are the opinions of these three very eminent Judges, concurring with the opinion, to which I have referred, of Lord Campbell in *Aikman* v. *Aikman* (1), and, in my judgment, conclusively dispose of this part of the case.

The only topic that remains is the one of the *factum* of the marriage in America. The Master of the Rolls, in his most able judgment, did not deal with this topic. I think the case is complete without it. Serjeant Jellett strongly contended that to refer to the *mere factum* of the marriage in America as evidence against the parties to it, on this question of domicil, would be to argue in a vicious circle. But however that may be, I think there is more in this case than the mere *factum* of the marriage in America. I think, as has been pointed out by the Lord Chancellor, that there are circumstances antecedent to the marriage, and leading up to it, which make its celebration in America evidence against them on the question of domicil.

This is the whole of this curious case, the most singular I have known, either on the bench or at the bar. This lady and gentleman, though they went through the ceremony of marriage, and apparently fulfil all the relations of married life, say they are not married. We assure them that they are married, and that their future life need not be disturbed by any compunctious visitings, so far as the law is concerned.

(1) 3 MacQ., H. L. Cas. 877.

PALLES, C.B. :—

The decision of this appeal involves the determination of the respective domicils, upon the 24th June, 1891, of Mr. M'Andrew and the plaintiff, each of whom is an English-born subject, and the domicil of origin of each of whom was English. This determination involves two separate considerations as to each of these individuals, viz. (1) was a domicil of choice acquired in America? and (2) if so, was that domicil of choice extinguished, and that of origin revived, at any time prior to the 24th June, 1891?

As to the acquisition by Mr. M'Andrew of this domicil of choice in America, I entirely agree in the judgments of the Master of the Rolls, the Lord Chancellor, and the Lord Chief Justice. Those judgments deal so exhaustively with the facts material to the question, and discuss, with such ample reference to the authorities, the question of law involved, that, agreeing as I do in the conclusion at which they have arrived, my observations in reference to it will be confined within a narrow compass, and will be directed to the single point, which was seriously urged upon us, viz. the effect of Mr. M'Andrew's declarations. Those declarations indicate an expectation, a desire, or possibly an intention, to return to England at some future period. The period of return contemplated in each is referred to in terms of the utmost vagueness, involving contingency, not only according to the facts then actually existing, but also in reference to those facts which were in the contemplation of Mr. M'Andrew. He would return "eventually," "ultimately," "when he had got through with his business," "when he had made his fortune." The man who uses such expressions is, to use the language of Lord Justice James (9 Ch. D. 457), "like a man who expects to reach the horizon; he finds it at last no nearer than it was at the beginning of his journey." Assuming that which is far from clear, that the true inference of fact from these declarations is that Mr. M'Andrew did continue, during his stay in America, to entertain an actual present intention, as distinguished from an expectation or a desire to return to England, the question is—What is the effect in law of such an intention upon his acquisition of a domicil of choice? It is clear that the answer to this question must depend upon the true character of the *animus manendi*

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which, when coupled with the *factum* of residence, establishes such a domicil. If that *animus manendi* include, as one of its essential parts (as Lord Cranworth and Lord Kingsdown appeared to be of opinion that it did), an intention as far as in the individual lay to divest himself of his nationality, *quatenus in illo exuere patriam*, it follows that expressions, which indicate an intention of resuming at a future period, whether defined or undefined, the political *status* of a citizen of the domicil of origin, negative the intention necessary to acquire a domicil of choice. It also may be that in such a case the same result would ensue from the intention mentioned by Lord Chelmsford in the passage which has been cited by Serjeant Jellett from his opinion in *Moorhouse* v. *Lord* (1). "The present intention," says that learned lord, "of making a place a person's permanent home can exist only where he has no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event, upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent. And even if such residence should continue for years, the same intention to terminate it being continually present to the mind, there is no moment of time at which it can be predicated that it has been the deliberate choice of a permanent home." If this passage expresses the law as it now exists, my opinion would be that those declarations would show that that domicil of choice was never acquired by Mr. M'Andrew. But is it law? The opinions of Lord Cranworth and Lord Kingsdown as to the nature of the *animus manendi* were not (nor was the sentence I have read from the opinion of Lord Chelmsford) necessary parts of their *rationes decidendi* in *Moorhouse* v. *Lord* (1); and those opinions of Lord Cranworth and Lord Kingsdown have since, in *Udny* v. *Udny* (2), been authoritatively decided not to be law, to depend upon a confusion of thought between the political and civil *status* of the individual, and to destroy the difference between *patria*

(1) 10 H. L. Cas. 272. (2) L. R. 1 H. L. Sc. 441.

and *domicilium*. Although Lord Chelmsford does not, in words, express his concurrence with Lord Cranworth or Lord Kingsdown as to this character of the *animus manendi*, I think it clear that their idea of domicil pervades his judgment too, and that that idea is the foundation of the sentence I have read. I therefore am of opinion that the decision in *Udny* v. *Udny* (1) involves a determination that the above passage of Lord Chelmsford's judgment is not an accurate statement of the law. The same erroneous view of the nature of the *animus manendi* appears to me to pervade such of the cases referred to by the plaintiff's counsel as were decided during the interval between *Moorhouse* v. *Lord* (2) and *Udny* v. *Udny* (1), and for that reason I am of opinion that we can derive no assistance from them in the solution of the question in hand.

I turn now, from the description of domicil based upon the erroneous interpretation of the *animus manendi*, to the true description of it which the House of Lords has substituted for the view of Lords Cranworth and Kingsdown, and upon the basis of which the value of the declarations in the present case must be determined. "Domicil of choice," says Lord Westbury, "is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. . . . It must be a residence fixed, not for a limited period, or particular purpose, but general and indefinite in its future contemplation."

I believe that this sentence expresses not only that which was our law in reference to domicil from the earliest period, but also the Roman law upon which our law has been founded, and thus *Udny* v. *Udny* (1) has the advantage of bringing back to the true principle the current of authorities which, at least till *Aikman* v. *Aikman* (3), had been uniform, but which was interrupted by some expressions of Lord Wensleydale in that case, and by the opinions I have referred to in *Moorhouse* v. *Lord* (2). It appears to me to

(1) L. R. 1 H. L. Sc. 441. (2) 10 H. L. Cas. 272. (3) 3 MacQ., H. L. Cas. 877.

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follow, as a corollary from the description of domicil which I have read from the opinion of Lord Westbury, that declarations such as we have here, indicating an intention to return upon an event which is contingent in fact, which is not contemplated by the individual as reasonably certain, and which cannot happen until after a period of time unlimited and undefined, are consistent with, instead of being destructive of, the necessary intention. It follows that, although when the time pointed at has arrived, and there has been an actual change of residence, such expressions may be of importance on the question of the change of the acquired domicil, they are of little if indeed of any weight in preventing the acquisition of a domicil, and I desire to express my opinion that, taking the definition of domicil from *Udny* v. *Udny* (1), as I have done, the declarations in the present case are entitled absolutely to no weight. I think that decision involves that they must be entirely excluded from consideration. Such, I think, was the uniform course of decision before *Moorhouse* v. *Lord* (1), and although the decisions after *Udny* v. *Udny* (2), do not seem to go the full logical length of holding that they are entitled to no weight, the reasoning used, in my opinion, necessarily leads to that conclusion, and leaves nothing wanting, except the courage to hold that which is inevitably involved in the *ratio decidendi*. As an instance of the law prior to *Moorhouse* v. *Lord* (1) I may refer to the opinion of the House of Lords, as expressed by Lord Thurlow in *Bruce* v. *Bruce* (3). There expressions almost identical with those in question here, if not indeed stronger, were relied upon; and they are disposed of by Lord Thurlow in the following words:—"He meant to return to his native country, and, let it be granted, he then meant to change his domicil, but he died before actually changing it." That sentence expresses exactly my view of the value and effect of such declarations.

Viewing in this light such of Mr. M'Andrew's declarations of intention as are proved by Mr. Wann, Mr. Watson, and Mr. White (and not referring at present to the evidence of Mr. M'Andrew and the plaintiff herself, as to their own intentions, a matter of a different character, with which I shall deal hereafter),

(1) 10 H. L. Cas. 272. (2) L. R. 1 H. L. Sc. 441. (3) 2 B. & P. 230, note.

and limiting my present judgment to the declarations proved by those three witnesses, I am of opinion that they are of no weight whatsoever, certainly not of weight sufficient to counterbalance the facts of the case. It follows that, at least at the period when Mr. M'Andrew purchased his house and grounds at Middleton, he acquired an American domicil of choice. At present I do not enter upon the question whether he afterwards lost that domicil; I reserve that question for a later period of my judgment.

There remain two questions, viz. (1) Did the plaintiff ever acquire an American domicil? and (2) if so, was the domicil of origin of either her or Mr. M'Andrew revived by the extinguishment of the American domicil of choice?

As to the acquisition by the plaintiff of an American domicil, I am unable to attribute to the expression casually used by her in her evidence, of "home," the extreme weight which was attached to it by the Master of the Rolls. It appears to me that, having regard to her American education, and probable mode of thought, and to her having spent her childhood and the earlier part of her married life in America, these expressions might well have been used by her when she had a different domicil, as for instance during her residence in Dublin, prior to 1882. Neither am I at present prepared to base my decision solely upon the plaintiff having acquired an American domicil upon her arrival in America from Ireland in 1882. The question here is that of her domicil, not in 1882 but on the 24th of June, 1891, and I am unwilling, in determining a question of domicil, usually difficult, and in the determination of which almost every act of the prior life of the individual may be material, to render the question for determination more difficult, by so narrowing it as to exclude from consideration facts admittedly material, especially in a case in which, in my mind, those facts are decisive of the question. This mode of considering the matter has the additional advantage of rendering it unnecessary to consider as a separate question whether her domicil of choice, if acquired, was extinguished by her presence in England in the spring of 1891. For this reason I assume, in favour of the plaintiff (although I am far from deciding it), that the evidence is not conclusive to show that, during her residence in America, up to the period when the marriage of Mr.

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M'Andrew's last unmarried daughter was in contemplation, the plaintiff had absolutely acquired an American domicil, but was in the position described by Lord Westbury, in the language of the Digest, "*quærens quo se conferat, atque ubi constituat domicilium.*" Thus upon this question, viz. the acquisition by the plaintiff of an American domicil, it becomes material to consider her conduct between the arrangement for this marriage and the celebration of her own marriage, on the 24th June, 1891. It is here that, in my opinion, we find the true answer to the argument so ably urged upon us by Serjeant Jellett, grounded upon the absence of any home of which this lady herself was mistress from 1882 to 1891.

Before, however, referring to these facts in detail, and in order to show their double operation, I must point out that they are also material upon the remaining question, viz. the alleged extinguishment of Mr. M'Andrew's American domicil. I say this because the presence of Mr. M'Andrew in London in the early part of 1891 was a sufficient *factum* of residence which, if coupled with an *animus manendi* there, would have extinguished his domicil of choice, and revived his domicil of origin. Thus we are driven for one purpose to determine *his* intention, and for another purpose to determine *her* intention, during those months; and as there is much in the case to lead to the inference that their intentions on the subject of residence were identical, I propose to consider them together.

I first take the position of the plaintiff as it existed immediately before the contemplation of the marriage of Miss M'Andrew. She had lived in America for twenty-six years, viz. from 1838, when she was three years of age, until 1864, and again from 1882 until 1891. She had married in 1858 a domiciled American, who, in 1864, had accompanied her to Ireland, where he died in 1871. She had lived from her husband's death in 1871 with her mother-in-law, Mrs. Anne Davis, until the death of the latter on the 22nd April, 1881, paying occasional visits to her relatives in America. In 1882, having no relatives in Ireland, she had returned to America, where all her relations, and all her husband's relations, were resident, bringing with her all her movable property, and, to use her own words, "going home to my mother's house." At this time her mother had been

eight years dead, but the expression shows that she treated it as the family home, though not necessarily her own. She had occasionally travelled in Europe, and in May, 1884, had been hurriedly summoned from Geneva to London in consequence of the illness of her sister, Mrs. Julia M'Andrew, whom she continued to tend until her death in that year. Shortly afterwards she had returned to America, and from 1887 she had permanently resided in the house of her brother-in-law, Mr. M'Andrew, superintending his household, taking care of his unmarried daughters, and occasionally travelling to Europe. The position was one which, according to the conventions of society, it was impossible could continue beyond the period of the marriage of the last of those young ladies. I think it is capable of being looked upon as a position that in its nature must have been deemed by all the parties temporary only, and that is the principal reason why I have hesitated at arriving at the conclusion of a domicil of choice having been acquired previously to the period at which I have now arrived. But the last of those young ladies was married in 1891, and it appears to me that from the moment of that marriage, and indeed from the moment at which it was arranged, the position of the parties wholly changed. Continuance in the position theretofore occupied was, not only according to the conventions of society but according to the contemplation of the plaintiff and Mr. M'Andrew themselves, impossible. As sister and brother-in-law they could not thenceforward continue to reside together in this palatial residence of Mr. M'Andrew. A change was inevitable. The question, in my mind, is, what was the change they contemplated? If they did not contemplate separation, but intended to continue to live in Mr. M'Andrew's residence, the only possible alternative is that they intended a change of their relation of sister and brother-in-law into that of husband and wife. I am, in my own mind, as clear as of any proposition in Euclid, that, *not* after the arrival of Mrs. Davis in America in June, 1891, as she swears, *not* when she and Mr. M'Andrew were in London in the early part of 1891, as he swears, but in America, not later than January, 1891, when the marriage of the last daughter was an accomplished fact, I say I am clear in my own mind that then and there an arrangement of

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marriage was come to between the two, and that that is the key to their subsequent conduct. If there had been such an arrangement, what would have been involved in its accomplishment? The forfeiture of Mrs. Davis's life estate in the property bequeathed to her by her late husband. Was there any mode by which that forfeiture might be prevented? Was there any mode by which an arrangement beneficial to Mrs. Davis might be made between her and the Bluecoat Hospital before her intended marriage was known to the hospital? If that idea had presented itself to the minds of persons not over-weighted by feelings of delicacy, what would be the mode of endeavouring to give effect to it? There should be a negotiation with the hospital, and for the purpose of that negotiation it would be convenient that the lady should be in England, so as to perfect, before the intention of marriage should become known, any arrangement which might be arrived at between her and the Hospital. It would also be convenient, having regard to the relation which it was intended Mr. M'Andrew should occupy towards her, that he, her intended husband, her adviser, the person principally interested in her pecuniary affairs, should also be in London, to assist in and advise upon the arrangement. Accordingly we find that, without other apparent motive, both Mr. M'Andrew and Mrs. Davis leave America, and arrive in London, in the early part of 1891. Almost immediately upon her arrival she commences negotiations with the Hospital for the sale of her life estate. One of the letters in evidence is dated as early as the 11th February. She continues in London during the entire of those negotiations. They are not broken off until the 5th June, and are so broken off, not by her, but by the Hospital. The object of her presence in London having thus ceased, almost as soon as a steamer can leave England we find her upon her journey to America. Mr. M'Andrew, it is true, had previously left, but he had left, according to his evidence, after the contract of marriage had been entered into, and after an arrangement had been made that he would meet Mrs. Davis on her arrival in America for the purpose of an immediate marriage. It may be said that in drawing from these facts the inference of a marriage arrangement in January, I am acting harshly, that I am attributing to this lady and gentleman

a course of conduct unworthy of them, in imputing to them wilful suppression from the Hospital of their intended marriage. But I find the answer to that in the evidence of Mr. M'Andrew himself, because the fact *was* suppressed from the Hospital until the very end of the negotiation; and we know from his evidence that, at an antecedent period, the marriage had been arranged, and that the fact was not brought to the notice of the Hospital. The length of time covered by the suppression is not, in my mind, material.

Taking this view of the case neither the journey to London nor the residence there could extinguish or at all affect the American domicil of Mr. M'Andrew, which previously had been established. The contemplated residence in England must, in this view, have been temporary merely, its main, and indeed only, object being to enable the continued residence of both, during the remainder of their lives, in Mr. M'Andrew's residence.

I have now the factors from which, coupled with the fact of the marriage, I have to draw the ultimate inference. I have Mr. M'Andrew, a domiciled American, living in the residence which for thirty years had been his home, in which his wife had died, from which his children had gone forth to be married, in which during later years he had enjoyed the advantage of the plaintiff's presence, the continuance of which presence had been interrupted by the marriage of his daughter, but interrupted only to be renewed after his own marriage. I have the plaintiff, with her American tastes and sympathies, who had spent her childhood in America, who, at the death of the last survivor in Europe of her husband's relatives, had returned to her own relatives and those of her husband in America, who for the last four years had resided in Mr. M'Andrew's house in America.

I have these two persons leaving this residence in America, with two objects, the principal one being their own marriage, and the subsidiary one that, previous to that marriage, the life estate should be sold. I have them, when the accomplishment of this latter purpose was rendered impossible by the refusal of the Governors, returning to New York for the purpose of being married, and, in my opinion, obviously with the intention of residing as married persons in Mr. M'Andrew's residence. At this time

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lawyers had been consulted; Mr. M'Andrew and Mrs. Davis were aware that if it were governed by English law the marriage would be null, and that, according to American law, a marriage between Americans in America ("in our country," to use the plaintiff's words) would be legal. Its legality, therefore, depended upon their intention, and upon nothing else. Under these circumstances, the object of both Mr. M'Andrew and the plaintiff being a legal marriage, the contention of the plaintiff is that we are to attribute to them an intention which they must have known would have defeated it.

Contrast the two positions. Their marriage would be legal if they intended to permanently reside in New York, the country with which they were associated by tastes, by habits, by long previous residence, by the presence of their relatives and friends. This intention would not interfere with a continuance of their theretofore frequent visits to Europe, but *their home* would continue to be where it had been for years.

On the other hand, if we are to impute to them an intention of thenceforth permanently residing in England (the only intention capable of extinguishing their American domicil which can be suggested, or which is open on the evidence), we must hold that their journey to England, their months spent there, and their return journey, had no other effect than to afford evidence that their marriage, *in facie ecclesiæ*, was a hollow and transparent sham, and that their governing motive was to adopt, as the country of their permanent residence, one in which their future relation to each other would be unacknowledged by law, and involving at least the lady in the deepest degradation.

To the present I have relied solely upon the *intention* to marry as distinct from the marriage itself. By carrying back the contract of marriage to January, 1891, I have endeavoured to show that the acts of Mr. M'Andrew and the plaintiff in coming to England and entering into the negotiations with the Hospital were governed by that intention, that when these negotiations were abortive, and they returned to America, their intention was to resume their previous residence in Mr. M'Andrew's house in America, with this sole difference, that they should reside there in the relation of man and wife instead of the previous relation, then

rendered impossible, of sister and brother-in-law. I have thus, as it appears to me, proved an element in the intention of Mrs. Davis, from the time she left America for London, of which I have not such clear evidence at any antecedent date; that is, an intention not only that she should reside in Mr. M'Andrew's house, but that that residence should be as permanent as the residence of Mr. M'Andrew himself, because that residence was to be in the character of his wife. Having, therefore, by this contract of marriage, identified the intention of the plaintiff with that of Mr. M'Andrew, I am entitled, for the purpose of ascertaining the degree of permanence of the residence in America contemplated by her, to resort to the position in which Mr. M'Andrew then stood, of a domiciled American citizen, and to call in aid all the arguments which arise from his position in reference to his own individual intention, for the purpose of ascertaining the intention of the lady who was to be his wife. Thus, dealing with her intention before the celebration of the marriage, and taking her, upon the evidence of Mr. M'Andrew, as going out by arrangement to meet him in order that a marriage should be immediately celebrated, I have her going out to be married to a domiciled American, a gentleman whose intention of residing permanently in America, *ex hypothesi*, continued to exist to the time of his daughter's marriage, and which remained unaffected by that marriage.

I now pass from the intention of marriage to the *factum* of the marriage itself. She arrived in America on the 22nd June. She is met, by appointment, by Mr. M'Andrew, for the purpose of an immediate marriage, and that marriage is celebrated upon the 24th June, in the American Episcopalian Church. I shall hereafter have to deal with the sworn statements of Mrs. Davis and Mr. M'Andrew as to their actual intention, immediately prior to the marriage, intention uncorroborated by a single act. At present, however, I propose to put declaration of intention against undeclared intention, and to contrast the evidence by which those antagonistic intentions are proved. I look upon this marriage as a declaration by each of the parties that no legal obstacle exists to that ceremony creating between them the civil relation which the law holds is created by marriage, the *status* of husband and

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wife. That it was intended to create that relation is clear. That it was believed by both parties before the marriage that it would operate, and after the marriage that it had operated, as a forfeiture of the life estate, is evident from the letters of both. Now, if either of those parties declared solemnly in New York, upon the 24th June, that it was their intention to permanently reside in America, would that declaration, if plainly and clearly proved, be equal in weight to the subsequent statement of either of those parties that they then had an intention of returning to live in England? Did they make that declaration? I am of opinion that they did. Take the case of two persons in Paris, who go to the English Embassy, arrange to be married there, and are in fact married there. Is that, or is it not, a declaration that they are at that time people domiciled in England? There are two formal modes of celebrating marriage there; one between persons who are then domiciled French people, the other between persons whose domicil is English, and the moment that a person appeals to the English law, to be married in Paris according to that law, it appears to me to be an eloquent declaration that he considers himself bound by that English law, and as having an English domicil. But the present case is stronger, because according to the English law there can be no such thing as a marriage between persons in this position, domiciled in England, and their marriage is valid if they are domiciled Americans. In my opinion the very fact of going through a ceremony of marriage as Americans is a declaration of the utmost solemnity that in their opinion they are subject to American law.

But there is something more to be added to this. These were not people without advice. They had appealed to persons skilled in the law as to the law upon this subject. They had been advised that a marriage between a man and his deceased wife's sister was illegal according to English law; they were aware that it was legal according to American law. To what state of facts did American law, to what did English law, apply? I have no hesitation in saying that they must have been advised that the English law applied to persons domiciled in England, and the American law to persons domiciled in America, so that they must have known that their marriage would not have

been legal unless they were domiciled in America, and I impute to them, without any doubt in my own mind, an intention to reside permanently in America, if for no other purpose, to effectuate their primary object of a legal marriage.

I have but one word more to say. It is as to the evidence relied upon by the plaintiff, as rebutting the intention of permanent residence in America. It consists of two matters: (1) the purchase of the estate at Guildford; and (2) intention proved by the plaintiff and Mr. M'Andrew.

Now, in reference to the purchase of the estate at Guildford, were it to be seriously relied upon, it would have been of the utmost moment, to have proved the contract itself. Its date was, admittedly, after the marriage, but nevertheless, had it been before, the plaintiff and Mr. M'Andrew formed the idea of insisting that the marriage was void, a time considerably subsequent to the marriage, it might have been of some materiality. Consequently this Court, upon the hearing of the appeal, offered the plaintiff's counsel to allow them to put in as evidence the contract, and they either declined or neglected to do so. I am obliged to arrive at the conclusion that the purchase was made *post litem motam*, and that it is therefore valueless as indicating intention before or at the time of the marriage.

There remains the parol evidence, which is uncertain as to date, and singularly scant and unsatisfactory. The only passages I can find, as to intention, or declaration of intention before the marriage, to reside in England, are two, Mr. M'Andrew says—"I made Mrs. Davis clearly understand that after we were married we should reside in England, but it was unnecessary." That means that she knew it before. Mrs. Davis says nothing as to this upon her direct testimony, but upon her cross-examination she is asked:—"Am I right in saying that up to May, 1892 it was your intention to go back home to America?" (*Answer*). "We came to live in England." (Counsel repeats). "Am I right in saying that, up to the 13th of May, 1892?" (*Answer*). "We did not intend to live there; we had to go back to see about our house and furniture. I do not know of any other reason for returning to America. At that date (that is May, 1892), and for a long

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time before, Mr. M'Andrew had definitely decided to give up America."

As to this evidence, it is to be remembered that it is the testimony of deeply interested persons, in reference to intention in their own minds, not demonstrated by any outward act capable of contradiction. I am unwilling to unnecessarily impute untruth to any witness, and I am far from doing it in the present case, because when witnesses are deeply interested in the views that are taken of a particular fact, especially when the fact is their own intention at an antecedent period, the experience of all of us is that the mind is able to believe that it remembers, as having existed at an antecedent period, intentions that really had their origin at a subsequent time. But irrespective of that, when we come to weigh testimony of this description, it is impossible to allow it, alone, to turn the balance against that which is well described in the cases, as "the facts of the lives" of these two individuals. In illustration of this I shall take the liberty of reading two passages, one from an opinion of Lord Colonsay, in reference to the credibility of such witnesses, and the other from a judgment of Dr. Lushington, as to the weight to be given to such statements, even though the Court be of opinion that the witnesses are credible.

Lord Colonsay says, in *Bell* v. *Kennedy* (1): "There is perhaps no chapter in law" (that is, the law relating to domicil) "that has, from such extensive discussion, received less of satisfactory settlement. That is no doubt attributable in no small degree to the nature of the subject, involving, as it does, inquiry into the *animus* of persons who have either died without leaving any clear record of their intentions, but allowing them to be collected by inference from acts, often equivocal; or" (and here are the words that apply to this case) "who, being alive and interested, have a natural, though it may be an unconscious, tendency to give to their by-gone feelings a tone and colour suggested by their present inclinations."

As to verbal declarations, Dr. Lushington says, in *Hodgson* v. *Beauchesne* (2)—"The weight to be attributed to them entirely depends upon circumstances, especially the time which has elapsed since they were made, and the circumstances under which they

(1) L. R. 1 H. L. Sc. 322. (2) 12 Moo. P. C. C. 325.

were made. To entitle such declarations to any weight, the Court must be satisfied, not only of the veracity of the witnesses who depose to such declarations, but the accuracy of their memory, and that the declarations contain a real expression of the intention of the deceased. Such evidence, though admissible, has been considered by many authorities as the lowest species of evidence, especially when encountered by conflicting declarations."

In the present case, the testimony of those two most interested witnesses, the plaintiff and Mr. M'Andrew, is opposed by facts of the most powerful nature. It is opposed by the circumstances of the life of each, especially by the acts and conduct of each from the month of January, 1891, by the object of their journey to London, by the object of their journey from London to America, and by the solemnization, in *facie ecclesiæ* of a marriage honestly intended by each to be legal and binding.

For these reasons I am satisfied that, from the time the plaintiff left America in January, 1891, and thence continuously until and on the 24th June, 1891, she had the *animus manendi* necessary to acquire an American domicil. I am further satisfied that the American domicil of Mr. M'Andrew was established, at latest at some time in January, 1891, that it was not changed at any period prior to the 24th June, 1891, that consequently the judgment of the Master of the Rolls was, in all respects, correct, and that this appeal should be dismissed with costs.

BARRY, L. J. :—

After the elaborate and exhaustive judgments which have been delivered by my learned colleagues who have preceded me, I have very little to say beyond that I concur in their decision. For a considerable time during the argument of Serjeant Jellett, he certainly had gone very near to capturing my acquiescence in a good deal, at all events, of what he said. But the further the case proceeded, the more the evidence was developed, and the more I have thought over it since the argument, the more perfectly satisfied I am that the Master of the Rolls was right, and that this appeal ought to be dismissed.

The question of domicil, generally speaking, is substantially a question of fact. There are certain legal principles, of course,

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which must be regarded and applied; but really in this particular case, with the exception of some criticism upon the language of Lords Cranworth and Kingsdown in *Moorhouse* v. *Lord* (1), there has been no controversy as to the principles applicable to the case. They were most lucidly stated by Serjeant Jellett, and as he laid them down they were, practically, adopted at the other side.

The only point upon which I expressed a doubt during the argument, as to the law laid down by Serjeant Jellett, was when he contended that Mrs. Davis, by coming to Ireland with her husband, reverted to her domicil of origin, which was England. He appeared to think that English and Irish domicils were, so to say, convertible. I do not concur in that; and I think the Lord Chancellor has referred to authorities showing that it is not so.

Well, then, the law having been ascertained, and practically undisputed, all else comes to be a question of fact.

Now, with reference to questions of fact in Courts of Equity, the result has been the same in cases of domicil as it has been in other cases arising in our law, that is, there has been gradually established a practice of confounding two things, namely, the opinion of the presiding Judge or Judges, in point of law, and the conclusion at which he or they have arrived in point of fact. Latterly it has come to be observed that considerable confusion does often arise from that practice; and it has been pointed out, and it is now generally admitted, that there is not much assistance really to be obtained by arguing from the facts of one case to the facts of another. Evidence of fact strikes differently different minds; and therefore, when I express concurrence with the judgments which I have heard in this case—with one in particular, that of the Lord Chancellor, my reading of which has dispensed with the necessity of my doing more than expressing my concurrence in it—I must not be understood as attributing the same weight, or absence of weight, to every circumstance, as my colleagues have done. I am only giving the result produced upon my mind by the evidence in the case, upon the propositions of fact which we have to decide.

(1) 10 H. L. Cas. 272.

Now, the first question that was argued before us by Serjeant Jellett was the domicil of Mrs. Davis, the plaintiff. The Lord Chancellor has been kind enough to give me the advantage of reading his judgment; and in that judgment I entirely concur. It has most elaborately and luminously discussed both the law and the facts; and, with the qualification which I have stated, I fully adopt the Lord Chancellor's judgment as mine on the question of the domicil of Mrs. Davis, and, I may add, also on the domicil of Mr. M'Andrew.

My view as to the domicil of Mrs. Davis may be given in very few words. I am of opinion that when Mrs. Davis left this country in 1882, and went to America, she left it for good and all, for better or worse, shaking the Irish dust from off her feet, and going back to that which she always looked upon as her home, America. I think that the phrase used by the Master of the Rolls (though it was criticised very much by Serjeant Jellett) in describing her domicil of origin in England as "technical," was rather a felicitous expression. What he meant was, that England must, in point of law, be regarded as her domicil of origin, but that, having regard to the facts, it was as casual and technical a domicil of origin as could possibly exist. Of course an infant of three days old has as good a domicil of origin, in the eye of the law, as an adult of thirty years; but what he meant to say was (and I agree with him) that from all her habits and associations, and the history of her life, the inference would be that in 1882 she would intend to go to America to reside, rather than any other place in the world. From the time she was three years old, all her habits of life, all the recollections of her childhood, her girlhood, and her womanhood, were associated with America. She admittedly knew no other home than America, except the home she had for a time in Ireland, when she came over here to reside as a married woman with her husband. That sojourn in Ireland would give her a domicil here for the time being; but when she left Ireland in 1882, every fact in the case shows that, from that time forward, she adopted America as her domicil. I do not rely upon the words she used in her evidence, "my mother's house," "my country," "my home." I do not rely upon these phrases, although they are not

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altogether to be disregarded. We all know that the expression "home," as applied to the mother country, is used by Australian colonists almost invariably, or at all events extensively; and I have heard travellers remark the difference between Australians and Americans in that respect, that Australians, even those who were born in Australia, when coming on a visit to England, say they are going "home." I therefore do not rely upon those expressions; but I think that everything this lady did, and everything she did not do, all point to the one conclusion, that when leaving Ireland in 1882, she was once and for all going back to America as the home of her choice. I therefore think it unnecessary to go into the very learned judgment of the Lord Chief Baron, in which, assuming, though not deciding, that there was no sufficient adoption of the American domicil in 1882 or before 1891, he stated that the basis of his opinion that the domicil of Mrs. Davis was American, was the occurrences of January and June, 1891, including the marriage. Though I should be inclined to agree with him that the matters he referred to would establish an American domicil at the time of the marriage, still, as that view was not argued before us, I am unwilling to confine myself to an adoption of it as my sole ground for deciding the question of her domicil. In a great deal of what he said I agree, indeed I do not express dissent from anything that he said; I only suspend my judgment as to whether I would rest my decision upon those matters to which he referred, and the effect of which was not discussed before us; but I think that much that he said was powerful confirmation of the view which I entertain, namely, that when she left this country in 1882, she meant to adopt America as her home.

As regards Mr. M'Andrew, I cannot go the length of saying that his declarations are to be entirely left out of consideration. I think there was a good deal in those declarations indicative of a general intention that at some time or other, "one of these days," some indefinite time, when something occurred, which might or might not happen, he would come over to reside in England. I think it is clear that he had a great predilection for England and its institutions, before those of America. I would attach considerable importance to his declarations if what he said had been

followed up by action, and if, before this marriage came on the *tapis* at all, he had bought a house and demesne, as it appears he did afterwards at Guildford. If he had done that before this marriage was thought of, I would have considered those declarations very powerful. But there is not a particle of evidence that this purchase of the property at Guildford was not a thing done with a view to the litigation which we are now deciding. All the other acts of his life were those of a man having his domicil in America. As to refusing to become a naturalised American, that is a thing that has happened in other cases, in the French case for example; and as to not getting himself naturalised during the American War, I declare, without being more nervous than the generality of people, I think a man would be a great enthusiast for American institutions if he got naturalised as an American citizen for the purpose of going out to fight at Bull's Run.

I am of opinion that Mrs. Davis and Mr. M'Andrew at the time of the marriage were both domiciled Americans, and therefore that the plaintiff's case must fail. The case is a remarkable one. It is certainly a curious circumstance that this wealthy man, for the sake of the few thousand pounds at which the life estate of his wife would be valued, would thus seek to establish the invalidity of their marriage.

Solicitors for the plaintiff: *Barrington & Sons.*
Solicitors for King's Hospital: *Henry Dix & Son.*

R. D. M.

Land Judge's Court. 1895.

May 8, 11.

In the MATTER of the ESTATE of JAMES SOMERVILLE, a Lunatic, Owner and Petitioner (1).

Compensation—Error in rental—Tithe rentcharge.

A rental with respect to six out of seven lots contained specific statements as to whether tithe rentcharge was payable or not; but as to lot 7 no reference to tithe rentcharge was made, although this lot was in fact liable to tithe rentcharge:—

Held, that the case was not distinguishable from *In re Bailie's Estate* (31 L. R. Ir. 98, 373), and that the purchaser of lot 7 was not entitled to compensation, even assuming that he purchased in ignorance of the existing liability.

The purchaser's father, who had undertaken to bid, and afterwards substituted his son, acting as his agent, having had, previously to the sale, actual knowledge of the liability:—

Held, that the purchaser could not be allowed under the circumstances to claim compensation on the ground of supposed forgetfulness of his agent.

Compensation may be given after the completion of the purchase.

Motion on behalf of Captain Eustace Guinness, purchaser of lot 7, for compensation in respect of tithe rentcharge payable out of the lands comprised in the lot. The estate had been set up for sale, in seven lots, but the sale was adjourned for want of sufficient bidding. Negotiations for the purchase of all the lots were subsequently entered into by Mr. Henry Guinness, of the firm of Guinness, Mahon & Company, and finally a proposal to purchase lot 7 for £3700 was submitted on behalf of Captain Eustace Guinness and was accepted by the Court on the 24th July, 1893. Captain Guinness was absent from Ireland at the time, and in the matter of the purchase he was represented by Mr. R. D. Guinness, another member of the firm. The following are the statements as to tithe rentcharge in the rental with respect to lots 1 to 6 inclusive.

Lot 1.—"Tithe rentcharge on Corbally is payable by the tenant. Tithe rentcharge on Ardkeenagh (Plunkett) and Clooncullaan, has been redeemed."

(1) Before Gibson, J., sitting for the Land Judge.

Lot 2.—"The tithe rentcharge is payable by the tenant."

Lot 3.—"The lands of Clooncommonmore are not subject to tithe rentcharge. The lands of Clogher are subject to apportioned part of tithe rentcharge which affected these lands and the lands of Cloonmeane (lot 5), apportioned by order of 22nd day of December, 1892. Apportioned part of tithe rentcharge £3 15*s.* 6*d.*"

Lot. 4.—"Tithe rentcharge payable is £5 8*s.* 10*d.*"

Lot 5.—"This lot is subject to apportioned part of tithe rentcharge which affected these lands and the lands of Clogher (part of lot 3), apportioned by order of 22nd day of December, 1892. Apportioned part of tithe rentcharge £3 7*s.* 2*d.*"

Lot 6.—"Tithe rentcharge payable is £7 2*s.* 8*d.*"

The rental gave no information as to whether lot 7 was or was not liable to tithe rentcharge, the omission having occurred through an accidental oversight of the clerk of the solicitors having carriage of the sale.

Several affidavits were filed, the substance of which is fully stated by Mr. Justice Gibson, in delivering judgment, the point to which they were principally directed being as to whether the purchaser had notice through his agent of the liability affecting lot 7.

H. G. Richards, for the purchaser:—

In six out of the seven lots in the rental express reference is made to tithe rentcharge. This distinguishes the present case from *In re Bailie's Estate* (1), and others of that class, because here there is not simply a total omission to make any allusion to tithe rentcharge but a statement is put forward as complete, which is only a partial statement of liability, and the purchaser has been misled: *Hamilton* v. *Bates* (2); *Mahony* v. *Davoren* (3). The Court in carrying out judicial sales is bound to act with *uberrima fides* towards the purchaser; *In re Bunbury's Estate* (4); Madden's Practice Land Judges, 3rd Edition, p. 38; *Perrin* v. *Roe* (5).

Law, Q.C., for the owner and petitioner:—

As to the rental, some of the denominations are expressly stated to be free from tithe rentcharge, and where no mention is made of

(1) 31 L. R. Ir. 98, 373.
(2) [1894] 1 I. R. 1.
(3) 30 L. R. Ir. 664.
(4) I. R. 1 Eq. 459.
(5) 25 L. R. Ir. 37.

Land Judge's Court. 1895.

In re SOMERVILLE'S ESTATE.

tithe rentcharge its existence must be presumed, according to the uniform practice of this Court. There was nothing to mislead, and the question of liability to tithe rentcharge did not in the slightest degree influence the purchaser.

[Counsel on both sides commented at considerable length on the affidavits].

May 11.

GIBSON, J.:—

This motion for compensation in respect of lot 7 raises an important question not touched by direct authority. If the motion were successful I should feel myself bound by the practice of the Court (see *Bourne's Estate*) (1), not to award more than eighteen years' purchase of the omitted tithe rentcharge.

Two questions were discussed by counsel. First, whether the rental was misleading, so as to take the case out of the decision of the Court of Appeal in *Bailie's Estate* (2); secondly, whether knowledge of the existence of the rentcharge is to be imputed to the purchaser in which case he could not have been misled.

The facts are briefly these. The late Mr. Henry Guinness had been receiver over the estate from 1874 to January, 1881, and during that time unquestionably acquired knowledge that the lands, the subject of lot 7, were liable to the rentcharges in question. He was also an incumbrancer on the estate, and had notice of Mr. Knox the succeeding receiver's accounts, and it is stated by Mr. Fitzhenry and by Mr. Knox that, from 1881, Mr. Overend, Mr. Guinness's solicitor, and Mr. Guinness himself, were in the habit of examining these accounts, in which credit for tithe rentcharge for the lands in lot 7 was duly claimed and allowed. This is not denied by Mr. Overend.

The rental on which the question turns deals with seven lots, in the first six of which tithe rentcharge is specifically referred to, while in the 7th lot the rental is altogether silent on the subject.

Under lot 1, it is noted that as to some of the lands, the tithe rentcharge is payable by the tenant, as to the rest that it had been redeemed by the tenant. In lot 2, the charge is said to be payable by the tenant. As to lot 3, it is stated that some of the lands are

(1) 23 L. R. Ir. 524. (2) 31 L. R. Ir. 373.

not subject to tithe rentcharge, and that the rest are subject to apportioned rentcharge. Lots 4, 5, 6, each show the amount of tithe rentcharge. Under lot 7 there is no mention of rentcharge. This omission was, it is said, the result of oversight.

The sale having proved abortive, in February, 1893, a negotiation was entered into for purchase by Mr. H. Guinness, but he did not offer a sufficient price, and the receiver procured a proposal for lot 1, for £4000, from Mr. Hunt, and for lot 7, for £3700 from Mr. Boylan.

These proposals, with one from Mr. Henry Guinness for all the lots, came before the Court, after several previous adjournments, on 19th June, 1893, when the offers of Hunt and Boylan were refused for reasons that were considered sufficient by the Court, and liberty was given to H. Guinness to withdraw his proposal, he undertaking by his solicitor to bid £4000 and £3700 for lots 1 and 7 respectively.

On July 24th, two proposals were submitted to the Court by Mr. Overend, one by Mr. R. S. Guinness, dated 21st July, for lot 1, for £4000, and one dated 21st July, by Eustace Guinness, for £3700 for lot 7. It appears from Mr. R. D. Guinness's affidavit that Eustace Guinness was away with his regiment at the time, and it is not disclosed how he and R. S. Guinness came to replace H. Guinness, who throughout had been dealing as the intending purchaser, and who so lately as June 19th had undertaken by his solicitor to bid the above sums. It is not suggested that Eustace Guinness knew any of the details of the purchase which was left in his father's hands, and was probably carried out by his father's money. So far as regards any question of knowledge and notice, the purchaser can be in no better position than if the sale had been to H. Guinness, who was his *alter ego*, if not himself principal.

In addition to the affidavits of Mr. R. D. Guinness and Mr. Overend, two documents are relied upon by the applicant as showing that the proposal was based on the supposition of lot 7 being tithe free. The first document is a rough calculation by R. D. Guinness, which refers to tithe rentcharge of other lots, and shows how the amount of offer was calculated. This paper is not material; it was a rough memo. with regard to other lots; and that it has been preserved after any possibility of purchasing these

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lots had disappeared is a remarkable illustration of accurate office administration. No similar document exists with regard to lot 7.

The other paper, prepared in part by Mr. Overend, and verified by him, but not referred to or explained in any way by R. D. Guinness, is more material. It is unfortunate that some of the figures are left unexplained. For instance, how is the total £19,796, arrived at? The only thing certain is that gross sums of £4000 and £3700 are set opposite lots 1 and 7 by Mr. Overend. There is a pencil calculation by H. Guinness in the margin purporting to show five rentcharges amounting to £24 17*s.* The second item in this calculation is £5 2*s.* 10*d.* and appears nowhere in the rental, and I do not know where Mr. H. Guinness got the figure.

The conveyance was executed in January, 1894, Mr. H. Guinness having died shortly before; and on the 15th June, 1894, Mr. Overend wrote to the Messrs. Fry, as solicitors having carriage, complaining that his client had been required to pay two rentcharges of £1 11*s.* 2*d.* and £3 19*s.* 8*d.* charged on lot 7. "As there is no mention of these rentcharges in the rental, I shall be glad to get an immediate explanation. Is there not some mistake?" This letter makes no charge of misrepresentation, and it would seem rather as if Mr. Overend considered that *Barnewall's Case* (1), if it was present to his mind, had ceased to represent the practice of the Court, and that such practice was governed by the view adopted by the Master of the Rolls in *Perrin* v. *Roe* (2).

The Messrs. Fry replied to this letter on the 18th June, stating that there were undoubtedly rentcharges, "as you, doubtless, are aware from the receiver's accounts."

The motion was instituted on the 10th February, 1895, but was adjourned more than once; and has now to be disposed of. The motion is grounded on two affidavits of Mr. R. D. Guinness and Mr. Overend, whose evidence as to their own state of mind I quite accept. It is to be regretted that direct evidence from H. Guinness and R. S. Guinness is not available, particularly as the substitution of R. S. Guinness, and Eustace Guinness, for Henry Guinness, is not accounted for.

(1) I. R. 1 Eq. 304. (2) 25 L. R. Ir. 37.

The first question is whether this rental is misleading. Mr. Richards contends that from the way tithe rentcharge is accounted for under the other lots, Mr. Guinness, as an unwary purchaser, would be thrown off his guard, and deceived into a belief that lot 7 was tithe free. In considering this question it is necessary to keep before us the settled law and practice of the Court. Tithes, like taxes and rates, were never regarded as an incumbrance which it was necessary to specify in a contract of sale (Sugden, V. & P., pp. 23, 322). Accordingly, compensation was not allowed to a purchaser on the ground that the rental on which he bought did not disclose the existence of tithe rentcharge (*Martin* v. *Cotter*) (1). Nor did it make any difference that the rent was described, as net or clear rent, or that the regulations of the Court required that tithe rentcharge should be stated in the rental (*Re Barnewall's Estate*, (2), Sugden, V. & P. p. 23.) The practice of the Landed Estates Court in this respect has not been affected by the Irish Church Act, 1869, and *Barnewall's Estate* (2) must still be obeyed as binding authority, as has been lately decided by the Court of Appeal in *Bailie's Estate* (3).

Looking at the particulars of lot 7, as they stand by themselves, the case is covered by *Barnewall's Case* (2). There is neither misrepresentation nor improper omission. There was no duty to the purchaser to state the tithe rentcharge. I have gone through the cases and cannot find any instance of compensation being granted where there was not misdescription or misrepresentation of the very property bought. It is said that an ordinary buyer, seeing that tithe rentcharge was deducted or accounted for in the first six lots, would infer from the net rent in lot 7, showing no such deduction, that no tithe rentcharge was payable. This is possible; and if the matter were *res nova*, there is a good deal to be said in favour of the view that where the regulations of the Court (which constitute the foundation of its practice), require the rentcharge to be specified, a purchaser, seeing the rental was silent, might reasonably suppose that no rentcharge existed. But there was, according to *Barnewall's Case* (2), no obligation to state it. In

(1) 8 Ir. Eq. R. 147.
(2) I. R. 1 Eq. 304.
(3) 31 L. R. Ir. 373.

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Gibson, J.

supplying particulars as to lots 1 to 6, not required by law, can the rental thereby become misleading as to lot 7, which if it stood alone, is not misdescribed? There is no suggestion of *mala fides*. I cannot discover any authority supporting compensation under such circumstances. There is the further point that where the lots are sold as tithe free as in case of lots 1 and 3, they are expressly so described. A prudent purchaser, who knew the practice of the Court, ought to have made inquiries before he assumed that lot 7 was free of rentcharge, which is a matter usually (as appears from the cases) the subject of express contract. On this, the first question argued, though anxious to guard not merely the honesty but the honour of judicial sales, I have come unwillingly to the conclusion that a case of misrepresentation has not been established to justify compensation.

The second question is whether the purchaser, through his agent, knew the truth. It is certain that where there is misrepresentation, responsibility cannot be evaded by showing that a party who has been in fact misled had the means of knowledge, or constructive notice of the truth; but here Mr. H. Guinness certainly in 1881, and probably afterwards, had not merely the means of knowledge, but actually knew what the true facts were. He may have forgotten or overlooked them in 1893. But no case has been cited where relief has been given under such circumstances. Forgetfulness is not a safe ground for a Court to go upon, especially in the case of an astute and accurate man of business. As was pointed out in *Burrowes* v. *Lock* (1), and *Slim* v. *Croucher* (2), it is impossible to search out and know the spirit and heart of man; and it would be dangerous, save under very exceptional circumstances, to permit anyone by alleging forgetfulness to obtain relief to which he would not otherwise be entitled. Mr. H. Guinness certainly ought to have made inquiries. It will be observed that there is no distinct statement in any of the affidavits that he was misled by the form of the rental as to the first six lots. It is quite possible that the case of *Barnewall's Estate* (3) was overlooked, or that it was supposed to be inapplicable after the decision in

(1) 10 Ves. 470.
(2) 1 D. F. & J. 518.
(3) I. R. 1 Eq. 304.

Perrin v. *Roe* (1). *Bailie's Case* (2), was only decided by Mr. Justice Monroe, in February, 1893, and was not reported till later. It was appealed from, and was not generally known probably to the public and solicitors' profession, as settling the law, till a considerable time afterwards.

A further point was made by Mr. Law, that whatever case there might have been for discharge on the ground of mistake, there was none for compensation after completion, where there was no direct misrepresentation, and it did not appear that the purchaser, who had got a good bargain, would not have given the same price even if he had known the facts. There is no doubt a distinction between discharge and compensation (*Martin* v. *Cotter*) (3) and the Court ought to be careful not, without strong ground, to allow a low price to be further reduced by deductions which, suggested after the event, would not really have affected the purchaser's bid. Such a case is very different from one where a test of *bona fides* is supplied by the purchaser being willing to throw up his bargain. Mr. Fitzhenry in his affidavit, points out that the affidavits on which the motion is grounded do not allege that the offer of £3700 would have been affected if the tithe rentcharge had been set out; and it is stated that Boylan's offer was irrespective of the existence of tithe rentcharge. I do not, however, think that the point made by Mr. Law would, if established, be of itself an answer to the present motion, though the considerations it suggests may not be irrelevant in reference to the other grounds of objection relied upon.

I add one observation. If it be the fact, as alleged by the solicitors having carriage, that the offer of £3700 would not have been affected by the tithe rentcharge having been stated (as it ought to have been), it is plain that the success of the motion necessarily involves loss to the incumbrancers and owner. That loss would result from the oversight of Messrs. Fry's assistant. Whether this loss might not impose liability on the solicitors having carriage, has not been discussed, and as the motion fails, I need not refer to the matter further. The question would largely depend on the practice and course of the Court, as to which I would

(1) 25 L. R. Ir. 37.
(2) 31 L. R. Ir. 98, 373.
(3) 9 Ir. Eq. R. 354.

Land Judge's Court. 1895.

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be unwilling to give any decision without the assistance of authority and precedent.

Solicitor for the purchaser: *T. T. L. Overend.*
Solicitors having carriage: *Fry & Son.*

W. G.

Land Judge's Court. 1895.

June 18.

IN THE MATTER OF THE ESTATE OF T. S. BLAKE; SLOANE, PETITIONER (1).

Judgment mortgage—Effect of—Equitable charge on land.

A judgment registered as a mortgage against lands, of which the judgment debtor is seised subject to a mortgage, does not affect a beneficial interest of the judgment debtor in the mortgage: *In re Browne's Estate* (unreported), explained and followed.

OBJECTION of William Duckett to the final schedule of incumbrances.

The owner was seised in fee of the lands of Clonbiggan, and its sub-denominations, in the county of Galway, being the estate in the matter, subject *inter alia* to two mortgages, for £6000 each, and each dated the 9th August, 1882. Under declarations of trust of equal dates the owner was entitled to a contingent interest in the mortgage debts. The objector having obtained a judgment against the owner in 1886, for £6330 debt and £5 16*s.* costs, registered the judgment as a mortgage on the 17th July, 1886, the affidavit of registry being in the usual form. The judgment mortgage appeared on the schedule subsequently to the mortgages of the 9th August, 1882. The objector sought to have it declared on the schedule that his judgment mortgage not only affected the equity of redemption, but charged whatever interest the owner had in the mortgages.

O'Connor, Q.C., for the objector.

Oulton, for the owner.

Russell, for the party having carriage.

(1) This and the two following cases were heard before MADDEN, J., sitting for the Land Judge.

MADDEN, J. :—

This point was decided many years ago, against the objector's contention, by Flanagan, J., in a case in which I was counsel, *In re Browne's Estate* (1). I have a distinct recollection of the grounds upon which that learned Judge, after consideration, decided the case, contrary to his original impression. They were shortly these: Money charged on land was not affected by a judgment, either under Pigot's Act, or under the older law. A judgment mortgage, so far as regards the subject-matter of the charge, holds the same position as a judgment under Pigot's Act. No doubt a mortgagor by deed cannot set up as against his mortgagee, any interest which he might have at the date of the execution of the mortgage, such as that in the present case. This principle, however, is founded on contract, and is inapplicable to a judgment mortgage. This security is the creation of statute. It is a mode of execution *in invitum*, and the judgment mortgagee acquires by registration what the statutes give him, neither more nor less. Even if I differed from the decision in *In re Browne* (1), I should consider myself bound to follow it, but I have always regarded it as sound law.

Solicitor for the objector: *E. M'Dermott.*
Solicitor for the owner: *R. H. Beauchamp.*

W. G.

IN THE MATTER OF THE ESTATE OF ANDREW JAMESON.

Practice—Easements—Objection to Final Notice—Landed Estates Court Act, ss. 51, 54.

A petition having been presented for declaration of title, an objection was filed claiming a public right of way, which was not admitted by the petitioner. The Court being satisfied that there was a substantial question at issue, refused to decide it upon the objection, and the petitioner declining to accept a declaration of title subject to existing rights of way (if any), allowed the

(1) Unreported.

Land Judge's Court. 1895.

In re JAMESON'S ESTATE.

petition to stand over in order to enable the petitioner to assert his right by an action of trespass.

Observations on the exercise by the Court of the duty of ascertaining easements, &c., under the Landed Estates Court Act.

MOTION on behalf of the owner and petitioner that the objection of James Arnold and Denis M'Nally to the final notice to tenants should be disallowed.

The objection was made by the objectors, one of whom resided at Baldoyle and the other at Howth, on behalf of themselves and all other persons interested, and claimed four several public rights of way, and alleged that these rights of way had been for upwards of forty years uninterruptedly used and enjoyed without any interference or obstruction. The right of way mainly insisted on was one skirting the coast line to the boundary between the petitioner's property and adjacent lands belonging to a Mr. Bellingham. The right of way was considered especially valuable, not merely by the inhabitants of the neighbourhood, but by visitors to the vicinity, on account of the magnificent view it commanded of Dublin Bay and the range of Dublin and Wicklow mountains. The petition was filed to obtain a declaration of the petitioner's title to the mansion house called Sutton House, and the town and lands of Sutton, otherwise Southtown, held in fee-farm. In the 2nd schedule to the petition there was stated, as to rights of way and other rights and easements affecting the premises, "None to your petitioner's knowledge." The petitioner had purchased the estate of the grantee in 1892. An association having been formed, and subscriptions collected for the defence of the rights claimed by the public, a lengthened correspondence took place between the solicitors for the association and the petitioner with a view of ascertaining the minimum concession that would be made, but no arrangement could be arrived at, and accordingly the objections now being dealt with were filed. Twenty-five affidavits were made with reference to the matters in dispute, but, having regard to the course adopted by the Court, it is unnecessary to enter into the facts thus in controversy further than to state that the Court was satisfied that the claim put forward raised a *bona fide* question.

Piers F. White, *Q.C.*, *R. E. Meredith*, *Q.C.*, and *John Leech*, for the petitioner:—

A public highway has been defined in the House of Lords as a public road leading from one public place to another public place (1). No right can exist in the public of going into the property of an individual for the purpose of recreation unless by express grant. Nor can there be a public right of way over a *cul de sac* in the country. If the Court makes a declaration of title, subject to existing rights of way, it will be an invitation to trespasses which can only be put an end to by bill of peace. This Court has all the powers of the Chancery Division to decide the question. The judge can see the place; witnesses can be summoned; the case can be tried here by a jury.

[MADDEN, J.: I have already, while sitting here for the Land Judge, exercised the power of selling subject to existing rights of way, if any.]

In *Bourke* v. *Davis* (2) Kay, J., says, at page 131:—"Another important fact is that the way claimed is not a way from one public place to another. In *Campbell* v. *Lang* (1) Lord Cranworth said that, speaking generally, 'a public right of way means a right to the public of passing from one public place to another public place. It was suggested that by the law of Scotland there might be a public right of way from a given place, but neither terminating in a public place nor leading to a public place. I doubt whether that can be the law of Scotland any more than it is the law of England.'"

Gordon, *Q.C.*, and *W. M. Jellett*, for the objectors, having stated in reply to the Court that they objected to the question being decided upon the present application, were not called upon to argue the case on the merits.

Meredith, *Q.C.*, referred to sects. 54 and 38 of the Landed Estates Court Act (21 & 22 Vict. c. 72).

Gordon, *Q.C.*, asked to have the motion refused, with costs, on the ground that the application was not merely to take the

(1) 1 Macq. 451. (2) 44 Ch. D. 110.

Land Judge's Court. 1895.

In re JAMESON'S ESTATE.

directions of the Court as to the disposal of the objection, but sought to disallow it, and so to conclude the issue raised adversely to the objectors.

MADDEN, J. :—

The owner purchased an estate situate on the Hill of Howth, which was held under a common title with another estate. He presented a petition for declaration of title, in order, it is stated, to have a title deed of the best character in his own possession. In the course of the proceedings it transpired that a very serious claim to certain rights of way was set up by persons resident in the neighbourhood of Howth. An objection has been filed raising a substantial question as to a public right of way along the cliffs, passing over the lands comprised in the petition. What I have now to determine is whether the issue so raised ought to be decided in the petition matter, or be left for the decision of the tribunals before which actions of trespass are ordinarily tried.

The jurisdiction vested in the Land Judge under the provisions of the Landed Estates Court Act, by virtue of which he is empowered to make a declaration of title to land, indefeasible and conclusive as regards both title and easements, is a very special one, and its exercise has been from the commencement carefully safeguarded. Indeed it was for some time doubted whether it ought to be exercised where any disputed question of fact was in issue. But since the decision of the Court of Chancery Appeal, in *In re Hendrick*, referred to by Flanagan, J., in *In re Darnley* (1), the existence of adverse claims involving issues of fact has not been considered a bar to the action of the Court, where those claims raise questions of title, affecting either the interest of the owner, or the nature of the tenancies subject to which title is to be declared. The issue which I am asked to decide is a different one. It is not properly speaking a question of title at all. It arises in consequence of the 54th section of the Landed Estates Court Act, which, for the first time, cast upon the Judge of this Court the duty of ascertaining "the rights of persons claiming rights of common, rights of way, or other easements." This is to be done "so far as he may deem

(1) 3 Ir. L. T. 741.

necessary for the purpose of such sale, conveyance, or declaration." The Court had no such duty cast upon it in the case of a sale under the Incumbered Estates Court Act, and many persons who have had occasion to direct their attention to the procedure of this Court, including (I am aware) the late Judge Flanagan, have regarded the change as an unfortunate one. It has prevented in many cases the sale of land by this Court in separate lots to occupying tenants, by reason of the great expense of ascertaining and defining the easements affecting each lot. In such cases it is found necessary either to dispense with the ascertainment of easements (a course which I have sometimes taken since I sat here) or to adopt the roundabout process of selling entire estates or townlands in one lot to the Land Commission, who re-sell to the tenants in separate lots, leaving the easements unascertained, as they are at liberty to do under the Land Purchase Acts. In the case of a declaration of title the powers with regard to easements require to be specially safeguarded, and I can conceive no case in which this is more necessary than where a public right of way is claimed. It would be an abuse of the procedure of the Court if the owner of land over which such a right was claimed or exercised, could, by presenting a petition for declaration of title, withdraw the case from the ordinary tribunals, and have what amounts to an action of trespass tried in this Court. In my opinion an action of trespass is not only the constitutional, but the most satisfactory mode of trying important issues of this kind, and if I thought that this petition had been presented for the purpose of withdrawing the question of a public right of way from the ordinary tribunals, I should dismiss it with costs. But I pay no attention to the charges which have been made on either side. The petition has been regularly presented for a legitimate purpose, and if the petitioner will accept a declaration of title, subject to the existing rights of the public, I will make it in that form; it is one which it is often necessary to adopt, even in cases of sale. In the present case it is, in my opinion, neither necessary nor expedient that I should try in this Court the existence of the public right of way claimed by the objectors. I cannot agree with Mr. White's contention that a public right of way cannot be legally established by user where it is used by the public merely for the purpose of

Land Judge's Court. 1895.

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enjoying the beauties of nature. In my opinion a user for this purpose, if proved, is quite as effectual for the creation of rights as one prompted by more sordid motives. As regards these objectors, I must say that if this right of way exists, as to which I decide nothing, it is fortunate that members of the public should have come forward for the preservation of one of those public rights which contribute so much to the enjoyment of beautiful scenery, and which might easily be lost through inattention. If the petitioner does not accept a declaration in the form which I have offered, he must proceed to assert his legal rights in the ordinary way, and I will allow the petition to stand over for this purpose until the first day of Michaelmas Sittings. In the event of proceedings being taken, a further adjournment can then be made.

His Lordship reserved the costs of the present motion.

Solicitors for the objectors: *Casey & Clay.*
Solicitors having carriage: *T. W. Hardman & Sons.*

W. G.

Land Judge's Court. 1895.

July 30.

IN THE MATTER OF THE ESTATE OF R. T. SLACKE; W. J. SLACKE, PETITIONER.

Insolvent estate—Owner entitled by descent, but having abstained from taking possession—Receiver appointed by incumbrancer—Costs of abortive proceedings against tenants—Implied contract of indemnity.

An incumbrancer upon an insolvent estate having obtained an order for a receiver, two receivers were successively appointed at his instance, neither of whom succeeded in collecting any rents. About ten years afterwards the Irish Land Commission, who were first incumbrancers, caused a third receiver to be appointed under the order. In the meantime the original owner died, and the estate descended upon his heir-at-law, against whom the proceedings were continued, but who never went into possession or interfered in any way with the estate. The newly-appointed receiver, by leave of the Court, brought an action against a tenant in the name of the present owner. The tenant succeeded on the plea of the Statute of Limitations, and issued execution for his costs against the owner, who was compelled to pay the amount. There being no funds in Court or in the receiver's hands:—

Held, that the Land Commission were bound to indemnify the owner.

MOTION on behalf of the owner that the Irish Land Commission be directed to repay to the owner the amount of costs which the owner had been compelled to pay under an execution at suit of the defendant in the action of *Slacke* v. *Duffy* which had been unsuccessfully instituted in the name of the owner by the receiver over the estate. The circumstances of the case will be found stated in the judgment of Mr. Justice Madden.

O'Shaughnessy, Q.C., for the owner in support of the motion :—

A *damnosa hereditas* was cast by descent upon the present owner. He never touched the estate in any way, and it would be a monstrous piece of iniquity if he had to pay for the blundering of his incumbrancers. It is a startling grievance that although for all practical purposes he was a perfect stranger to the estate, an execution for upwards of £63 was put into his house.

Cherry, for the Irish Land Commission :—

All that the Land Commission did was to substitute a new receiver in the place of one who had died. In doing so they were merely acting in discharge of their important public functions. They gave no instructions to the receiver to bring actions. Still less did they authorize him to sue in the name of the owner. The receiver acted entirely on his own responsibility. It might have been different if the Land Commission had obtained the initial order appointing a receiver.

O'Shaughnessy, Q.C., in reply :—

A receiver is appointed for the purpose of collecting rents, and if they are unpaid to sue for them. The Land Commission must be taken to have foreseen the natural consequences of the step they took when they got the new receiver appointed. If the state of facts, as now disclosed, had been brought before the Court when the ruling was made giving liberty to proceed against the tenants, the Court would, as a matter of course, have required an indemnity to be given.

Land Judge's Court. 1895. *In re* SLACKE'S ESTATE.

MADDEN, J.:—

In this case a petition was presented for the sale of the estate of William L. Slacke. A receiver was appointed in the year 1884, at the instance of Marcus Purcell, an incumbrancer. This receiver died without having collected any rents, and another receiver was substituted for him in the ordinary course, at the instance of the same incumbrancer. That receiver also died without collecting any rents. The owner of the estate, which was hopelessly insolvent, died intestate pending the proceedings, which were continued against the present owner, as his heir-at-law. The present owner could not disclaim the inheritance in fee-simple, which descended upon him by operation of law. But both he and his father regarding the estate as worthless left it derelict, and never in any way interfered in the proceedings, or meddled with the lands. In this state of facts, the Land Commission, who were first chargeants by virtue of a terminable annuity in lieu of tithe rentcharge, finding the estate left derelict by the petitioner, by the incumbrancer who had obtained the receiver, and by the owner, took, as they were bound to do, active proceedings for the recovery of their demand. They were not in a position to apply for a substantive order appointing a receiver, inasmuch as such an order had been already made. The only course open to them was that which they took, namely, to intervene in the proceedings, and get the benefit of the order for appointment of a receiver by having a new receiver named in place of the receiver then dead. Mr. Cherry, on behalf of the Land Commission, did not deny that if substantive proceedings had been instituted, and a receiver appointed at their instance, they would be responsible to the owner in the state of facts which now exist; but he endeavours to distinguish the present case on the ground that the order for the appointment of a receiver had already been made before the intervention of the Land Commission, and that all they did was to get the benefit of that order by nominating a new receiver. In my opinion, that is a difference without a distinction in the present case, and, for this reason; the course taken by the Land Commission was the only course legally open to them. They did all in their power to put in action the machinery of this Court for the collection of

rents by a receiver, in the name of the owner, and by the course which things have taken they have incurred precisely the same degree of responsibility as would be incurred by an incumbrancer instituting substantive proceedings for the appointment of a receiver. The question remains what is that responsibility? The state of facts in the present case is peculiar. The estate had been left derelict, and the Statute of Limitations had been running for years in favour of the tenants when the new receiver was appointed. He took the course followed in ordinary cases. He applied for, and obtained, liberty to proceed against certain tenants in the name of the owner. One of these tenants, named Duffy, took defence, succeeded in the action, and obtained judgment for £63 odd, for costs against the plaintiff, on foot of which an execution was put into the house of the owner, who was thus compelled to pay.

On the part of the owner it is now contended that as he was a perfect stranger to all that was being done, and merely a nominal plaintiff, whose name was used without his consent for the purposes of the Land Commission, it must be taken that his name was thus used on an implied undertaking to indemnify him; and that inasmuch as the receiver in the present case has not, and is not likely to have, any moneys in his hands, he is entitled to an order directly against the Land Commission. The use of the owner's name in an action by a receiver is of everyday occurrence in this Court, and I have never known an express indemnity given, or asked for, on the occasion of an order authorizing such a proceeding. But I have not the smallest doubt that if the peculiar facts of the present case had been brought before the learned Judge, he would not have made the order, except on the terms of the Land Commission giving an indemnity to the owner, whose name was used under exceptional circumstances, for the purposes of the Land Commission, in proceedings in which he had no interest whatever. Moreover, I must hold the Land Commission to have been aware of the law, and of the legal consequences of the course they took in applying for a new receiver—they must be taken to have known that a receiver is appointed to receive, and, if necessary, to sue for rents, and that the only mode in which he can sue is

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In re SLACKE'S ESTATE.

Madden, J.

by action in the names of the persons legally entitled to recover the rent. I must, therefore, interpret their action as an application to the Court for the purpose of suing Duffy (amongst others) in the name of the owner. In my opinion an owner who is a stranger to proceedings in this Court against whom they have been continued as heir-at-law without his consent, and who finds his name used as nominal plaintiff in an action, is entitled to be indemnified in respect of the costs of the action by the party at whose instance, and in whose interests, the action was brought. I am further of opinion that the Land Commission have made themselves responsible for the bringing of the action of *Slacke* v. *Duffy* by the course which they have taken. I will, therefore, grant the application. The order will declare the owner entitled to be indemnified by the Land Commission in respect of the use of his name as plaintiff in the action of *Slacke* v. *Duffy* and will direct the amount he was compelled to pay to be repaid him by the Land Commission, reserving liberty to the Land Commission to apply, if so advised, for recoupment out of any funds which may come in to the credit of the estate.

Solicitors for the owner: *M'Mahon & Tweedy.*
Solicitor for the Irish Land Commission: *Alexander.*

W. G.

BLAKE *v.* O'REILLY.

M. R.
1894.
Nov. 23.
Dec. 21.
1895.
March 5.

(1893. No. 742.)

Tenant for life—Leaseholds—Wasting security—Power of trustees to raise charge by sale, or mortgage, or out of rents and profits—Apportionment of burden of charge between tenant for life and remainderman.

A testator devised and bequeathed freehold and leasehold property to trustees for a term of 1000 years, upon trust by mortgage, or sale, or by and out of the rents and profits, or by any other reasonable means, to raise a sum of money charged on the lands, and, subject thereto, upon trust for the testator's eldest son for life, with remainder to his first and other sons in tail. The testator died in 1871, and his eldest son entered into receipt of the rents and profits of the property, and paid the interest on the charge. No steps were taken by the trustees to raise the charge until 1894, when an action was brought by them to administer the testator's estate so far as related to the property subject to the trusts of the term.

Upon the taking of the accounts in Chambers, the remainderman (the infant son of the tenant for life), contended that the leasehold property should have been sold immediately after the death of the testator, and that the tenant for life should account for the rents and profits received by him since the death.

Held, that, although the trustees had a discretion as to the mode of raising the charge, the interests of the remainderman—the leasehold being a wasting security—had been prejudiced by the postponement of the raising of the charge, and that the Court had power to adjust the burden of the charge between the parties, according to their interest in the property, and to make the tenant for life contribute to the amount raised. Form of decree.

Marker v. *Kekewich* (8 Hare, 291) followed.

ADJOURNED SURCHARGE.

This action was brought by Maurice Charles Joseph Blake and Richard O'Reilly against Joseph Richard O'Reilly and his son Joseph James O'Reilly, an infant, to have the trusts of the will of Richard Pierce O'Reilly, deceased (father of the defendant Joseph Richard O'Reilly) carried into execution so far as the same related to the term of 1000 years, thereby limited to the plaintiffs, who

M. R. 1894.

BLAKE *v.* O'REILLY.

were trustees of the said term, and for that purpose to have the real and personal estate of the said deceased so far as might be necessary administered under the direction of the Court. The defendant Joseph Richard O'Reilly, was sued as executor of the said deceased, and as devisee under the said will, and the defendant Joseph James O'Reilly, as devisee under the said will. The material facts of the case were as follows:—

The testator, on the occasion of the marriage of his daughter, Jeanette O'Reilly, with the plaintiff Maurice Charles Joseph Blake, by indenture dated 19th November, 1863, mortgaged the lands of Grennanstown, in the county of Meath, held by him in fee-simple, to the plaintiff Richard O'Reilly and Charles Joseph Blake, to secure payment of £10,000, by instalments, with interest at £3 10*s.* per cent. per annum, payable half-yearly, as therein mentioned.

This principal sum of £10,000 and the interest thereon were secured to the said Richard O'Reilly and Charles Joseph Blake as trustees of the settlement executed on the occasion of the said marriage, dated 20th November, 1863, and made between the testator and his daughter, of the first part, the plaintiff, Maurice Charles Joseph Blake, of the second part, Valentine O'Connor Blake, of the third part, and the plaintiff Richard O'Reilly and the said Charles Joseph Blake, of the fourth part, and it was thereby declared, amongst other things, that the said trustees should pay the income of the said principal sum of £10,000 to the plaintiff Maurice Charles Joseph Blake, during his life, and after his decease, if the said Jeanette O'Reilly should then be living, and should not immediately thereupon become entitled to the full jointure of £800 therein mentioned, to pay the said income to the said Jeanette O'Reilly during her life, or until she should become entitled to the said jointure, or should marry again, during the lifetime of any child of the said marriage, and after the decease of the said Maurice Charles Joseph Blake, and the determination of the interest of the said Jeanette O'Reilly in the said income, then, upon trust, for the children of the said marriage (other than the eldest son, becoming entitled to the hereditaments therein mentioned), in manner therein declared.

The testator made his will, dated the 11th October, 1865, and

thereby, after reciting, amongst other things, that he was seized in fee-simple of certain lands in the counties of Longford, Westmeath and Meath, subject, as to certain lands in the county of Westmeath, to a mortgage for £6040, and to a jointure of £300 a-year for his wife, and subject, as to the said lands in the county of Meath, to the said mortgage for £10,000 to the said trustees of the said settlement; and reciting that he was seized of certain hereditaments in the city of Dublin, held for lives renewable for ever, or some other estate of freehold, and that he was also entitled to certain messuages in the county of Dublin and city of Dublin respectively, under leases for terms of years, and that he was also possessed of considerable other personal estate—the said testator after bequeathing certain household effects to his wife, and certain medical books and other things to his son Henry Francis O'Reilly, bequeathed to the plaintiffs his house "Sans Souci," with the grounds adjoining, held under a lease for a term of years, and the plate and furniture therein, in trust for his wife during her life, subject to the rent payable thereout, and after her decease, in trust for his son, the defendant Joseph Richard O'Reilly, his executors, administrators and assigns; and the said testator thereby bequeathed his house and premises, known as 21 Rutland-square, in the city of Dublin, held for lives renewable for ever, and the furniture therein, to the plaintiffs, upon trust for his said son Henry Francis O'Reilly; but if his said son should die under the age of twenty-six years, then the said testator directed that the said last-mentioned house and furniture should be sold by the plaintiffs, and the proceeds thereof should form part of his residuary personal estate; and the said testator thereby directed that the remaining parts of his personal estate not thereinbefore bequeathed, and exclusive of leasehold interests, should be applicable as the primary fund for the payment of his funeral and testamentary expenses and the pecuniary legacies bequeathed by his will, and all debts due by him, whether by specialty or otherwise, not forming incumbrances on any portion of his real estates and leasehold interests, and also of such sum as should be owing by him on foot of the said mortgage of the lands of Grennanstown for £10,000; and the said testator thereby, except as to the said mortgage for £10,000, exempted his general personal estate

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from the payment of any debts which should form incumbrances upon his real estates and leasehold interests, and declared that all debts so forming incumbrances save as aforesaid should be respectively payable out of the premises respectively charged therewith as the primary fund for that purpose; and the said testator thereby declared that if his personal estate not thereinbefore specifically bequeathed, and not consisting of leasehold interests, should prove insufficient to pay in full such of his debts as were thereinbefore made primarily payable thereout, and also all pecuniary legacies bequeathed by his said will, then the said testator thereby charged the amount of such deficiency upon all his fee-simple, freehold and leasehold interests of which his said son, the defendant Joseph Richard O'Reilly, was thereinafter made first tenant for life in exoneration of any other portion of the testator's fee-simple and freehold estates and leasehold interests, and of such portions of his personal estate as were thereby specifically bequeathed; and the said testator, after bequeathing two charitable legacies of £200 and £300 respectively, devised all and singular his lands, townlands, rentcharges, messuages, and hereditaments in the counties of Longford and Westmeath, and in the county and city of Dublin (except the said house in Rutland-square), held by him either in fee or for any estate of freehold, to the intent that his said wife might receive during her life an annuity of £1000; and subject thereto, in the first place, to the further intent that Charles Kenny and Philip O'Reilly, their heirs and assigns, should receive a perpetual annuity of £500, payable as therein, and that they should stand possessed of the said perpetual annuity upon the trusts thereinafter declared concerning the same; and subject thereto to the use of the plaintiffs, their executors, administrators and assigns, for the term of 1000 years from his decease, upon the trusts thereinafter declared concerning the same; and subject to the said term and the trusts thereof, to the use of the defendant Joseph Richard O'Reilly, during his life, and after his decease to the use of his first and other sons successively in tail male, with divers remainders over; and the said testator, after declaring the trusts relating to the said perpetual annuity of £500, devised the said lands of Grennanstown, with the mansion-house thereon, and other freehold lands in the county

of Meath, and subject as therein mentioned to the said mortgage for £10,000, to the use of the said Charles Kenny and Philip O'Reilly for the term of 500 years, upon the trusts thereinafter declared, and subject thereto to the use of his son, the said Henry Francis O'Reilly, for life, with remainder to his issue in tail male, and upon the death of his said son Henry Francis O'Reilly, and failure of his issue male, to the use of the testator's said son, the defendant Joseph Richard O'Reilly, for life, with remainder to his first and other sons in tail male, with divers remainders over, as therein mentioned; and it was thereby declared that the said term of 1000 years was limited to the plaintiffs upon the trusts following, viz.:—In the first place out of the rents and profits of such of the hereditaments and premises comprised in the said term as might be held subject to any rents or covenants, to pay such rents and perform such covenants, and in the next place by mortgage or sale of the premises comprised in the said term, or any part thereof, or by and out of the rents and profits of the said premises, or by any other reasonable ways and means, to raise and satisfy the amount due at the said testator's death on foot of the said mortgage for £10,000, and also any other debts which might form specific charges upon the premises comprised in the said term, and also the amount of such of testator's debts as might not form charges upon any of his lands, and also the pecuniary legacies by his said will bequeathed, or so much of said several debts and legacies as his personal estate should be insufficient to satisfy; and in the next place to secure to his said wife the jointure thereinbefore limited to her, and also to secure to the said Charles Kenny and Philip O'Reilly the said perpetual annuity of £500; and the said testator, after thereby declaring the trusts of the said term of 500 years which were to provide for the maintenance of the respective tenants for life and tenants in tail of the said lands during the periods and in the manner therein mentioned, and after making certain other provisions and directions, bequeathed all and singular his lands, tenements and hereditaments held for any term or terms of years, situate in the city and county of Dublin, exclusive of his said house "Sans Souci," to the plaintiffs, their executors, administrators and assigns, upon trust to pay the rents thereby reserved and perform the covenants subject to which

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the same were held, and in the next place upon the same trusts as were thereinbefore declared concerning the said term of 1000 years, and should be subject, in common with the hereditaments thereinbefore charged therewith, to the annual sums of £1000 and £100 for his said wife and brother, and said perpetual annuity of £500, and also certain other trusts and provisions therein mentioned; and subject thereto, then upon trust, so far as the nature of the duties and rules of law would admit, to the uses and limitations thereinbefore contained concerning testator's freehold lands and hereditaments situate in the counties of Longford, Westmeath, Dublin, and city of Dublin; and the said testator thereby devised and bequeathed all the residue of his estate and effects, real, freehold and personal, unto his son, the defendant Joseph Richard O'Reilly, his heirs, executors, administrators, and assigns, and appointed his wife and the defendant Joseph Richard O'Reilly, and the plaintiff Richard O'Reilly to be the executors of his said will.

The testator died on the 17th July, 1870, without having altered his will, save by two codicils, which were not material to the question in the case. Probate of the said will and codicils was on the 3rd August, 1870, granted forth of the principal Registry of Her Majesty's Court of Probate in Ireland to the said defendant Joseph Richard O'Reilly, one of the executors in the said will named, power being reserved to make a like grant to the other executors.

The said Henry Francis O'Reilly died in the lifetime of the said testator. The testator's wife survived him, but afterwards died on or about the 27th day of July, 1886.

At the date of the death of the testator, the entire of the principal sum of of £10,000 was due to the trustees of the settlement of the 20th November, 1863, on foot of the mortgage of the 19th day of November, 1863, but subsequently the sum of £1595 was paid to the said trustees by the defendant Joseph Richard O'Reilly, as he alleged out of his own moneys, leaving the sum of £8405 still due to the trustees of settlement, and the same was due to them on foot of the said mortgage.

On the 7th December, 1892, the plaintiff Richard O'Reilly and Charles Blake, the mortgagees in the said mortgage, presented

a petition to the Land Judge of the Chancery Division for the sale of the said lands of Grennanstown, therein comprised, for the purpose of raising the said sum of £8405, and a conditional order for the sale of the said lands was made on the 8th day of December, 1892.

The defendant Joseph Richard O'Reilly, who was tenant for life of the lands of Grennanstown, under the will of the testator, and also his executor, as aforesaid, alleged that there was no personal estate of the testator available to pay off the said sum of £8405 so remaining due as aforesaid on foot of the said mortgage of the 19th day of November, 1863, or any part thereof, and called upon the plaintiffs, as trustees of the said term of 1000 years created by the said will of the said testator, and which comprised the estates of the said testator in the counties of Longford, Westmeath, and Dublin, and city of Dublin, but did not comprise the lands of Grennanstown, to raise thereout sufficient moneys to pay off the said sum of £8405. The plaintiffs were willing to take steps to raise the said sum of £8405, pursuant to the trusts of the said term, but were advised that they could not safely do so until it had been definitely ascertained to what extent (if any) that part of the personal estate of the testator, which by his will was declared to be the primary fund for the payment of, amongst other debts and liabilities, the said mortgage on the lands of Grennanstown, was insufficient for the payment of the principal sum still remaining due on the said mortgage. The plaintiffs accordingly brought this action against Joseph Richard O'Reilly and his eldest son, Joseph James O'Reilly, who was a minor.

Joseph Richard O'Reilly, in his statement of defence, alleged that as executor he had got and realized in due course of administration the testator's personal estate, exclusive of his house of "Sans Souci," with the grounds adjoining, and the plate and furniture therein, and the house 21 Rutland-square, and the furniture therein, which were specifically bequeathed by the testator, and also exclusive of the leasehold interests by the will also specifically bequeathed; and that he had expended the funds so got in and realized, which by the will were declared to be applicable as the primary fund for the purpose, in payment of the testator's

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funeral and his testamentary expenses, and in part discharge of his debts, but that the same had proved insufficient to pay the debts in full, and insufficient to pay any portion of the pecuniary legacies; and that he had made up the amount necessary for payment in full of the said debts and legacies out of his own money, and had also expended out of his own money the further sum of £1595, already mentioned, in part discharge of the said principal sum, leaving £8405 still due on foot thereof.

On the 8th November, 1893, the action came on upon motion for judgment against the defendant Joseph Richard O'Reilly, upon the admissions of fact in his defence, and against the defendant Joseph James O'Reilly, in default of defence, and a decree was made to carry out the trusts of the will so far as they related to the said term of 1000 years, and accounts and inquiries were directed.

On the taking of the accounts in Chambers the defendant Joseph James O'Reilly, sought to surcharge the defendant Joseph Richard O'Reilly, with (1) the sum of £4,500, being the rents received by him since the testator's death of his leasehold houses situate in Lower Mount-street and Warrington-place, Dublin, producing a profit rent of £200 a year; and (2) with £11,400, the rents received by him since the testator's death of his leasehold houses in Upper Mount-street, Dublin, producing a profit rent of £475 a year. This surcharge was reserved by the Chief Clerk for the opinion of the Master of the Rolls, and came before him in Chamber on the 5th November, and was then adjourned into Court and came on for hearing on the 22nd November.

Price, Q.C., and *C. W. R. Brady*, for the defendant Joseph James O'Reilly:—

The trustees of the term of one thousand years did not raise the amount due on foot of the mortgage of £10,090 after the testator's death, but allowed the tenant for life to receive the rents and profits of the freeholds and leaseholds which were subject to the trusts of the term. It is now desired to raise the amount due, and the question is how is it to be raised, and how is it to be appor-

tioned between the tenant for life and the remainderman. The leaseholds in question were liable to contribute to the charges created by the testator, and should have been sold after his death to pay those charges or to provide for payment of them when required. Instead of that, the tenant for life has taken advantage of the passiveness of the trustees and gone into possession of the whole of the rents, and has merely kept down the interest. Meantime the leaseholds, which are property of a wasting character, were diminished in value. He should account for the rents of the leaseholds received by him since the death of the testator, and contribute thereout a sum sufficient to adjust the rights between him and the remainderman, so that the proportion of the charge which the leaseholds should properly bear may be borne by the tenant for life and by the remainderman according to their respective interests. This can be done by a calculation. [Counsel handed in a memorandum as to how the calculation was to be made, which will be found in the judgment of the Master of the Rolls.]

It may be said that the trustees had a discretion as to how to raise the charge, namely, by sale, mortgage, or out of the rents and profits, and that this discretion should not be interfered with. But though trustees may have a discretion in a case of this kind, they will be restrained by the Court if they do not exercise it with due regard to the respective interests of tenant for life and remainderman, and if they have exercised it without due regard to such interests, the Court will adjust the rights: *Hampden* v. *Earl of Buckinghamshire* (1); *Marquess of Bute* v. *Ryder* (2); *Marker* v. *Kekewich* (3); *Pattenden* v. *Hobson* (4); Lewin on Trusts, 9th ed. p. 469. The cases as to contribution with regard to renewable leaseholds are in point: *White* v. *White* (5); *Townley* v. *Bond* (6); *Jones* v. *Jones* (7); *Hudleston* v. *Whelpdale* (8). The trustees are not exercising any discretion in the present case: if they intend to raise the money by mortgage, that is not the right way to raise it, having regard to the nature of the property, which is a wasting

(1) [1893] 2 Ch. 544.
(2) 27 Ch. D. 215.
(3) 8 Hare, 291.
(4) 1 Eq. Rep. 28.
(5) 9 Ves. 554.
(6) 4 Dr. & W. 240; 2 C. & L. 393.
(7) 5 Hare, 440.
(8) 9 Hare, 775.

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security like the renewable leaseholds in *Hudleston* v. *Whelpdale* (1). The question of contribution will only be deferred till the mortgagee requires a sale. The proper course is to sell.

P. F. White, Q.C., and *R. H. Sheil*, for the defendant Joseph Richard O'Reilly :—

The proposition contended for is a novel equity; the tenant for life did all that he was bound to do, namely, to keep down the interest; he is not a trustee, and there is no power to make him refund the past rents, which he was entitled to receive. The cases cited do not support the contention that before any loss can be shown to have been suffered by the remainderman, who here is a minor, the tenant for life can be compelled to contribute in the way suggested. If it was the primary duty of the trustees to have sold the leaseholds as being a wasting security immediately after the testator's death, then they were guilty of a breach of trust; but that cannot be maintained here, for the trustees had power to postpone raising the charge. The proposition contended for has never been applied to a case like the present, and there is sufficient evidence in the will to show that the proposition could not apply here. There is no authority for apportioning the charge on the different portions of the property charged; the remainderman can only take what is left, and further, the freeholds may be sufficient to pay the charge. It is said that if an apportionment is not made, the remainderman will lose, because the leaseholds may come to an end before he comes into possession: but the answer to that is, that whether a leasehold, which is put in settlement, as here, is charged or not, the remainderman does not get the same benefit out of it as the tenant for life, as the leasehold may have run out, or have very few years to run; therefore there is nothing to show that any duty is imposed on the tenant for life beyond paying interest on the charges. If there is no duty to apportion, then there is no obligation to sell: and if there is no obligation to sell, there is no power to hold the tenant for life liable for back rents. The contention on the other side must go to this, that the trustees had no power to raise the amount by mort-

(1) 9 Hare, 775.

gage, for it is said that that would be an interference with the rights of the remainderman. It is just the same as if the money had been raised by a mortgage, as the tenant for life has been paying interest on the sum to be raised. The cases as to renewable leaseholds have no application; there is no question here of preserving property, as there was there by payment of fines. [They also referred to *Tewart* v. *Lawson* (1); *Norton* v. *Johnson* (2); *Re Green* (3).]

Oulton, for the plaintiffs:—

The lands of Grennanstown, in the events which have happened, belong to the defendant Joseph Richard O'Reilly, for life, with remainder to his son, the defendant Joseph James O'Reilly, in tail: the plaintiffs were requested by the tenant for life to raise the amount of the charge remaining due and are willing to do so, but they were advised that it was necessary to bring this action to ascertain whether the primary fund for payment of the charge was exhausted and how much was charged on the term.

C. W. R. Brady, in reply;—

The trustees might have raised the required amount by sale or mortgage, but the equitable rights of the parties interested would have had to be subsequently adjusted. The property has depreciated in value by the lapse of twenty-four years. The circumstance that there are three different powers of raising the money given to the trustees shows that the remainderman is not to bear the entire burden, and that the trustees should exercise a proper discretion. [He referred to Lewin on Trusts, pp. 409, 411.]

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THE MASTER OF THE ROLLS, having stated the nature of the action, and the material facts as above set out, proceeded as follows:—

The scheme of the will, so far as concerns the present question, was probably this. At the time of the marriage of his daughter, having found that it was not convenient to pay the £10,000 put in settlement out of his personal estate, Dr. O'Reilly raised it by a mortgage of the lands of Grennanstown, and

(1) L. R. 18 Eq. 491. (2) 30 Ch. D. 649. (3) 40 Ch. D. 610.

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the mortgagees have their rights against those lands; but as between the persons taking under his will he directed that the £10,000 should be charged on the property which he devised to his son Joseph Richard O'Reilly for life, and it was accordingly charged in the will firstly in point of time on the fee-simple or freehold lands other than Grennanstown, and secondly in point of time on the leasehold estates, which were also devised to Joseph Richard O'Reilly for life, but as between the freeholds and leaseholds there was no priority in reference to this charge, and, as regards it, all this property was charged with it and formed a blended fund for its payment. The testator was evidently quite alive to the distinction between freehold and chattels real, and perfectly acquainted with the mode in which his different properties were held. In the course of the proceedings at Chambers the question was raised in this state of facts. Dr. O'Reilly died 17th July, 1871, and up to the year 1894 the interest on the charge of £10,000 continued to be regularly paid to the trustees of the settlement, and by some means the principal sum was reduced to £8405. Except that, there were no steps taken to raise the charge, which still remains a subsisting charge on Grennanstown, but as between the parties taking under the will it is primarily charged on the real estate and chattels real other than Grennanstown; and inasmuch as both were in terms settled in the same way, so far as the nature of the property would allow, namely, to Joseph Richard O'Reilly for life, with remainder to his first and other sons successively in tail male, with remainders over, and as some of the chattels real are held for short terms of year, it is obvious that part of the security for the £10,000 is of a wasting character. It was contended on behalf of the tenant in remainder, who is an infant, that by permitting the tenant for life to receive the whole of the rents and profits of the chattels real an injustice has been done to the tenant in remainder, because the whole of the chattels real ought to be charged in the hands of the tenant for life with the payment of the capital sum as well as with interest thereon. The matter came before me on adjournment from Chambers in respect of items Nos. 2 and 3 in the surcharge lodged on behalf of the infant defendant, dated 3rd October, 1894. They are as follows:—2. £4800, the rent since

the death of the testator of his leasehold houses in Lower Mount-street, and Warrington-place, Dublin, received by the executor and producing a profit rent of £200 a year. 3. £11,400, the rents since the death of the testator of his leasehold houses in Upper Mount-street, Dublin, received by the executor, and producing a profit rent of £475 a year.

It was contended that Mr. O'Reilly, the tenant for life, ought to refund those sums, on the supposition that these chattels real ought to have been sold and converted into money within a reasonable time after the death of the testator, and the incumbrances paid out of the proceeds. The matter was adjourned into Court, and I suggested that the terms of the surcharge should be put into writing in order that it might be more precisely stated what was the contention on behalf of the remainderman, and accordingly the present suggestion is this "That Joseph Richard O'Reilly should in the account now being taken be charged with an amount to be ascertained as follows, namely:—That it should be ascertained by inquiry what proportion of the total sum which was at the date of the testator's death raisable under the trusts of the term of one thousand years should have been borne by the leaseholds bequeathed by his will, and that such proportion should be considered as divided into so many aliquot parts as the number of years of the term of such leaseholds as remained unexpired at the death of the testator, and that the amount with which the said Joseph R. O'Reilly is to be so charged should be so many of such aliquot parts as the number of years from the death of the testator to the present time; and further, that the said Joseph R. O'Reilly should be ordered from time to time to bring into Court at the expiration of each year an amount equal to one of such aliquot parts, the same to be invested, and the dividends from time to time paid to the said Joseph R. O'Reilly and the capital to remain in Court until the death of the said Joseph R. O'Reilly, or until the person or persons for the time being entitled to the sum to be raised under the trusts of the said term shall compel the raising of the same, whichever of such events shall first happen, and then abide the further order of the Court; all proper enquiries to be made to carry out the above declaration."

Now, this being a blended fund, if any question arises as to

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how the charge ought to be borne as between the several parts of it, the general rule is that the value of each particular denomination of property should be ascertained as at the date of the charge, that is at the death of the testator, and that each should bear its proportion. If the estate was all fee-simple it would make no matter when the charge was raised; but where the securities are in part of a wasting character, it is obvious that it is important, as it would be for the benefit of the tenant for life to have the raising of the charge postponed, and the value of the wasting securities would be depreciated meanwhile by efflux of time.

Mr. White, for the defendant, contended that the claim put forward on behalf of the infant remainderman was of a novel character, a new equity as he termed it. I do not think it is. It is rather a new illustration of the application of an old and well established doctrine of this Court, which is that, in sanctioning the exercise of the discretion of trustees in dealing with an estate, the law will take care that no one interested in the property shall be injured, if it can be avoided. A discretion, such as the trustees here have, will be upheld; that is, the raising of the money by sale, or mortgage, or retention of the rents, if made *bona fide*, would be valid and unquestioned. But if by selecting one instead of another of these ways the rights of tenant for life or remainderman under the will should be prejudiced, the Court will redress the wrong so caused so far as is possible. The ordinary rule in the case of a wasting security, as between tenant for life and remainderman, when property is settled in the way I have mentioned, is that it is the duty of the trustees to sell and convert into money the wasting security, and to invest it and pay the interest of the fund to the tenant for life, leaving the residue to go to those entitled in remainder, so that the whole shall be enjoyed according to the interests given. This can only be done by converting the wasting security into a permanent one, and it is *prima facie* the duty of the trustees to invest the proceeds of the sale in consols or other recognized investment. But although this is the ordinary rule, it is open to a testator to indicate an intention to permit the property to be enjoyed *in specie* by the tenant for life. It is plain in this will that if there were no other question the leaseholds might be enjoyed in specie. A direction, as here, to trustees to pay the rent and

perform the covenants of leases has been held to show that there is no duty to convert the leaseholds, but to show an intention that they are to be enjoyed in specie by the successive takers and not converted. That is not, however, precisely the question here. The question is as to the incidence of the £10,000 charge upon the property which is to be enjoyed in specie, and how that charge is to be borne. Still it is the plain scope of the will that each taker shall enjoy in proportion to his interest: and a charge upon the whole should also be borne proportionately unless a contrary intention appear. To postpone raising the charge till near the end of the first life estate for instance, would be to wrong the remainderman in the interests of the tenant for life. To raise the charge wholly out of rents and profits would be to wrong the tenant for life for the benefit of the remainderman. Yet, either way might be lawful under this will in the sense of not being in conflict with its express provisions. The question is how to remedy the injustice. This can only be done by following the plain intention of the testator, by endeavouring, so far as possible, to mould the rights which may have been interfered with back again into conformity with the principle that the enjoyment of each estate shall be proportioned to the interest meant to be conferred, and that the burden upon it shall be similarly apportioned. It cannot have been the intention of the testator that the £10,000 shall fall on the tenancy for life or on the estate in remainder according as the trustees chose to decide. If we take a simpler case, this will be apparent. If the £10,000 had been charged only on a leasehold held for a short term, it would hardly be contended that the trustees could postpone raising it till the term nearly ran out, thus leaving the tenant for life free from all burthen for the capital sum, and leaving nothing to the remainderman.

Mr. White relied strongly and justly on the wide discretion conferred upon the trustees. The trusts of the term are "by mortgage or sale of the premises comprised in the said term, or any part thereof, or by and out of the rents and profits of the said premises, or by any other reasonable ways and means to raise and satisfy the amount due at the testator's death on foot of the said mortgage for £10,000." He argued that there is no power to control this discretion, and that when *bona fide* exercised it binds

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everyone. This would be clearly so as to third persons, and no distinction need be drawn between the exercise of a discretion and the non-exercise of it, as in this case, when the non-exercise is in effect equivalent to its exercise, by giving to the tenant for life the same benefit which he would have derived from its being exercised in his favour.

In *Hampden* v. *The Earl of Buckinghamshire* (1) the Court of Appeal did control the discretion of a trustee. But the trustee was himself tenant for life, and the power vested in him by the Settled Land Act enabled him to do the act, and did not prescribe the mode in which it ought to be done. That case has therefore no very direct bearing upon the question involved in the present. In *Marquess of Bute* v. *Ryder* (2) a question arose as to the power of trustees to pay charges for improvements out of a fund arising from accumulations during the minority of the tenant for life, which accumulations, subject to the power of the trustees, were for the benefit of the tenant for life. No question arose as to the power of the trustees to apply those accumulations to the payment of what were admittedly improvements, and amounted to over £1,000,000. The question was whether, having been so applied, the payments became a charge upon the inheritance, in exoneration of the tenant for life, save as to interest, which of course he must keep down. Bacon, V.-C., there says:—"In the construction of wills the sole object of the law is to pay implicit respect to the intention of testators, so far as that intention can be satisfactorily ascertained by the true interpretation of the words by which that intention is found to be expressed. But the will is, nevertheless, in all cases to be interpreted with regard to its whole scope and tenor, and the circumstances, so far as they are indicated by the words the testator has used, but not travelling beyond them. The nature and object of the gift or disposition, and the character of the donee, are also not to be disregarded. Many cases have occurred, some of which have been referred to in the arguments, in which the respective rights of tenants for life and the persons entitled in remainder has been considered by the Court. In the cases in which the subject of the interests has consisted of transient

(1) [1893] 2 Ch. 545. (2) 27 Ch. D. 196.

or waning or wasting property, but which may be capable of support or restoration by an expenditure of money (as in the case of leaseholds renewable, and as to copyholds on successive admissions by payment of fees) the Court has endeavoured to do justice to the several parties by apportioning the burthen between the persons entitled successively to the enjoyment. The task has, no doubt, been at all times difficult, but it has been accomplished upon principles of sense and justice and right reasoning. None of the cases mentioned—nor have I been able to find any—can properly be said to be directly in point, because (among other reasons) they relate to the preservation of actual or existing subjects, while the present case relates to the acquisition of new and additional property. They do, however, in my judgment, recognise and establish principles and general rules which must govern all cases." After referring to cases he continues at p. 218 as follows :—" Upon the whole tenor and context, and upon the full scope of the will, upon the principles established by the cases referred to, upon the right which tenants for life have at all times to have adjusted all accounts so as to give effect to the true rights of all persons interested, upon the established principle of marshalling which I take to be applicable to the case before me, I have come, not without careful and anxious deliberation, to the conclusion that I am bound to decide the plaintiff's claim in his favour, and declare that 'the moneys expended out of income of the Glamorganshire estates received during the plaintiff's minority by the trustees of the term of 1500 years created by the will, dated the 22nd of July, 1847, of the late Marquis of Bute, in constructing and enlarging docks or in other permanent works and improvements (including the purchase of land at or near Cardiff) for the benefit of the settled estate in the county of Glamorgan demised by the said will, are a charge upon the *corpus* of such parts of the said Glamorganshire estates as are comprised in the term of 1500 years.'"

That case differs wholly from the present in its facts, but it illustrates the principle and its application to the only matter to be dealt with here.

Marker v. *Kekewich* (1) has an important bearing on the present

(1) 8 Hare, 291.

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case. The facts so far as they are material will be found stated in the judgment of Wigram, V. C. The trusts of the term there were, in the first place, by cutting and felling and selling and converting into money all or any part of the timber standing on the lands, or by demising, mortgaging, or selling the premises comprised in the term, or any part thereof, or by all or any of the said ways or means to raise the sum of £10,000. Wigram, V. C., says:—"In order to explain my views, the case must be noticed under two different aspects: first, as between the parties entitled to the charges created by the settlement of the 11th of October, 1844, on the one side, and the persons entitled to the estates subject to the charges on the other; and secondly, as between the tenant for life of the estates, subject to the charges on the one side, and the parties entitled in remainder on the other. The former of these questions may be dismissed with a summary observation. It is only for the sake of giving distinctness to the latter question that it requires even such an observation. It is admitted on all hands that the parties entitled to the charges have *prima facie* a right to have these charges raised in the manner most beneficial to themselves. The limits, if any, of this right must be found in the obligation which this Court, in some cases, imposes, in compelling parties to exercise their paramount rights in the manner least injurious to others, as (for example) in the case of marshalling assets, and some cases of contribution. The argument therefore, in this case, was properly confined to the latter question. It was said, for some of the demurring parties, that the trustees had an unlimited discretion to raise the charges in such way as they thought fit, and that, if their discretion were but honestly exercised, the Court would leave the charges to be finally borne by these parties upon whom the mere act of the trustees might chance to throw it, and the case of *Brown* v. *Higgs* (1) and other cases of that class were cited in support of the argument. It was this argument which for the moment embarrassed me. I felt satisfied that it could not be sound; and assuming that the case of the defendants might require my adoption of the argument, I did not at once see my way to the conclusion that I am about to

(1) 8 Ves. 561.

state. If the argument was right, the trustees, by postponing the raising of the charges until after the death of the tenant for life, might turn the whole burden of principal and interest upon the inheritance; or, by entering into possession of the estates, in the first instance, and collecting the rents and profits, including the timber which the tenant for life sans waste might cut, they might deprive a tenant for life of all benefit under the settlement; or, by pursuing the course which it is the object of this bill to restrain, namely, by raising the charges immediately by sale or mortgage, they might apportion the charges between the tenant for life and remainderman in proportion to their respective interests in the estates. It is impossible that I can ascribe so capricious an intention to the settlor, unless the words of the settlement imperatively require it. Now, nothing can, in my opinion, be more clear than the intention of the settlor in this case, as expressed in the settlement. She intended that her estates, in the first instance, should be subject to certain charges in favour of the persons to whom these charges are given; and, subject to the charges, she has given her estates to a tenant for life, unimpeachable for waste, with remainders over. All else in the settlement relating to the manner of raising the charges is mere machinery for carrying out the intentions I have described. It follows, that as between the tenant for life and the remainderman, the tenant for life must pay the interest of the charges, and the *corpus* of the estate must bear the charges upon it. The tenant for life, in the meantime, is entitled, as part of the profits of the estate, to the timber which a tenant for life, not impeachable for waste, has a right to cut, as between himself and the remainderman."

That case in principle enunciates a doctrine which is not a novel one, and has been recognised by the Court in numbers of cases.

The cases cited, or rather mentioned by Mr. White after the argument had closed, are not really opposed in principle to *Marker* v. *Kekewich* (1).

In *Tewart* v. *Lawson* (2) the question turned upon the words of the will, and a direction to accumulate rents and profits till all

(1) 8 Hare, 291. (2) L. R. 18 Eq. 490.

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charges were paid off, and that no tenant for life or in tail should be entitled to the rents and profits till the debts were cleared off. Hall, V.C., held that the rents and profits alone were the only fund intended by the testator for payment, but that, when the debts were in full paid off by the action of a creditor who caused part of the estate to be sold, the tenant for life was entitled to be let into possession. He says at p. 194 :—"Upon the construction of the parts of the will which I have read, I think it clear in this case that the testator designed and contemplated that the annual rents and profits should be applied for the purpose of clearing the estate from debt in the way which he has expressed; and that it was not intended by this form of direction to authorise the trustees in any way to resort to the *corpus* for the purpose of paying the debts. On the contrary, the testator clearly, as I think, negatives that, and designs payment of the debts by applying the annual rents and profits, however long it might take. But though that was the scheme of the testator, that scheme was necessarily subservient to the rights of the creditors to get paid in a different way. The testator does not by his will at all attempt to make any provision for that state of things arising. He leaves that to take its chance, and he creates a trust of the rents and profits to pay the debts, so that they would be paid in that way, and that way only, unless the creditors availed themselves of their legal rights to be paid in a different way, or unless in any way consistent with the law, including the administration of estates in this Court, the debts came to be paid off otherwise than in the way directed. If we, therefore, look to the language of the will in the events which have happened the trust has come to an end, and the debts have in fact been paid. The rents and profits were only to be applied to pay the debts until the debts were actually paid. That being the case, I am now asked in reality to create a new trust and a new scheme; to say what might have been attempted to have been said by the testator, to the effect following :—'Provided that if any part of my estates shall be sold at the instance of the creditors or otherwise, or if the equity of redemption of any part of my estates shall be foreclosed, then I direct an accumulation of rents to go on until there shall have been got together a fund equal to the value of the property so sold, or the equity of redemption

of which has been foreclosed, and such fund shall be dealt with as constituting part of the estate which is to be subject to the limitations of my will.' However, the testator has not said that; and I cannot take upon myself to say that I must read the will as if the testator had so said, seeing that that certainly would, to say the least, raise a very grave question indeed whether such a provision as that was valid."

I have read enough to show that that case can have no application where there is no such direction, but the mode of payment is left in the widest terms to be selected by the trustees, and where there is a paramount intention that the charge should be borne according to the interests of the successive takers. *Baldock* v. *Green* (1) was a similar case. There was a direction to pay debts out of the rents, dividends, or annual proceeds of the testator's estate. The debts were partially paid out of the *corpus* of the estate, namely out of the proceeds of sale of a leasehold property, and it was contended by the legatee of the proceeds of the leasehold that that property should be exonerated from payment of debts, and that it should be recouped out of the income of the rest of the property. It was contended, on the other hand, that the debts were charged on the *corpus*, and that in any case as they had in fact been paid out of the *corpus*, there was nothing in the will to compel the defendant as tenant for life of specifically bequeathed personalty to recoup the *corpus* out of her income. Stirling, J., there says at p. 616 :—"I have come to the conclusion that this argument is well founded. A similar question was considered by Hall, V. C., in *Tewart* v. *Lawson* (2)." Having referred in detail to that case he continues at p. 617 :—"The reasoning of the Vice-Chancellor appears to me to be applicable to the present case. The testator must be taken to have known that his debts after his death were payable out of *corpus*, and he has not chosen to provide for the event of his debts being paid in that way, and I am not at liberty to supply the omission. The debts have been properly paid out of the *corpus* of the estate, and it appears to me that there is nothing in the will which compels me to say that the defendant must recoup the *corpus* out of the

(1) 40 Ch. Div. 610. (2) L. R. 18 Eq. 490.

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income of the property specifically bequeathed to her. I think therefore the summons fails."

There the debts were paid in full. The will was silent as to recouping out of the income of the tenant for life. Here the charge has not been paid. To the same effect is *Norton* v. *Johnson* (1). The property in the present case is all here before me; the charge is not paid off. I think the case is in substance governed by *Marker* v. *Kekewich* (2), and that substantially the contention on behalf of the remainderman is correct. But in considering how the matter is now to be dealt with, it was urged that I had no control over the past rents. I do not accede to that contention. The whole subject matter is before me, and where payments have been made, which are not in accordance with what ought to have been done, I have jurisdiction to order the matter to be set right. I have no doubt there is jurisdiction to make Mr. O'Reilly refund the money, but it should be exercised in the way which I shall indicate, and I do not intend to decide at the present moment more than that I have power to do this. Mr. O'Reilly innocently received the entire rents and profits of the leaseholds, and is therefore in a better position than he ought to be as regards these rents and profits which he has so received. It was also an innocent transaction on the part of the trustees, and there may have been circumstances to guide their discretion in the matter, and it might have been imprudent to have had the charge raised before this. But while I think the mode of calculation embodied in the notice of surcharge which I have read is strictly right, and that if the thing had to be done *de novo*, it should be done in that way, yet I must not lose sight of the fact that it might be a hardship on this gentleman, who has received money under the belief that it was rightly his, to order him to bring back such portion as he had received in excess of his strict right. I think he ought to have the option to have the amount when ascertained charged upon the future rents, if he prefers it, with power to the parties interested to apply. The leaseholds should only bear a proportionate part of the charge according to their value, and the freeholds the residue. It is not all that amount, but such proportion only as has been received in

(1) 30 Ch. D. 652. (2) 8 Hare, 291.

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prejudice of the rights of the remainderman during the time that Mr. O'Reilly has been in possession. The inquiry will be directed in the way I shall indicate. As matter of convenience the amount to be charged on the future rents of the leaseholds might be secured by a policy of insurance, as I suggested in the course of the argument; but if this is done, it must be a matter of arrangement. I shall declare the rights of the parties in the way I have indicated, and direct an inquiry as to the adjustment of the charge, and how it is to be raised.

This was obviously a question proper to be raised in the interests of the remainderman, and I shall direct, as has been done in similar cases in England, that the costs of all parties be costs in the matter to be taxed as between solicitor and client.

The inquiry and accounts as to value should commence on the expiration of a reasonable time after the end of the executor's year, and if no party objects I shall say two years after the death of the testator.

The minutes of decree having been spoken to on February 19th, and an inquiry having been waived, the following decree was made :—

1895.
March 5.

"THIS COURT doth declare that such portion of the testator's funeral and testamentary expenses and debts not forming incumbrances on any portion of his real estates and leasehold interests, and the pecuniary legacies bequeathed by his will, and such sum as was owing by the testator at the time of his death on foot of the mortgage of the lands of Grennanstown for £10,000, in his said will mentioned, as the primary fund thereby bequeathed for the payment thereof shall be found insufficient to pay, is well charged on the fee, freehold and leasehold interests of which the said defendant Joseph Richard O'Reilly, was by the said will made first tenant for life, in equal priority, and in exoneration of any other portion of the testator's fee-simple and freehold estates and leasehold interests, and of such portions of his personal estate as were by the said will specifically bequeathed; And this Court doth also declare that as between the defendant Joseph Richard O'Reilly, and the infant defendant Joseph James O'Reilly, and all other the persons or person entitled in remainder to the said fee-simple and freehold and leasehold interests expectant on the determination of the life estate of the said defendant Joseph Richard O'Reilly, the leasehold interest so charged with the said portion of the said sum as afore-

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said (along with the said fee-simple and freehold estate) shall be charged with such part thereof as bears the same proportion to the entire thereof as the value of the said leasehold interest bears to the entire value of the said fee-simple and freehold estates and leasehold interests taken together, such respective values to be ascertained as at the expiration of two years from the date of the death of the said testator; and that the said defendant, Joseph Richard O'Reilly, was liable as such tenant for life as aforesaid to contribute to the sum which shall be so ascertained to be chargeable upon the said leasehold interests in respect of such liability as aforesaid, according to his actual interests in each of the respective leaseholds; and it appearing that the testator was possessed of two leasehold interests, namely, one in Lower Mount-street, of which a term of seventy-two years was unexpired at the time of his death, and the other in Upper Mount-street, Dublin, of which a term of one hundred and ten years was unexpired at the time of his death, and that the value of the former was in the month of August, one thousand eight hundred and seventy, the sum of £2163, and that the value of the latter was in the same month the sum of £6054, and it also appearing that the entire value of the said fee-simple and freehold estates of the said testator at the expiration of two years after his death was the sum of £64,262, and the several parties agreeing to such valuation being adopted, and it further appearing that the portion of the testator's said funeral and testamentary expenses and debts and said pecuniary legacies, which the said primary fund has been found insufficient to pay, is the sum of £2105 3*s.* 1*d.*, which sum when added to the sum of £10,000, due at the time of the testator's death on foot of the said mortgage, makes a total sum of £12,105 3*s.* 1d., chargeable upon the said fee-simple, freehold and leasehold estates, pursuant to the said declaration, and it appearing from the foregoing figures that the part of the said sum of £12,105 3*s.* 1*d.*, with which the first-mentioned leasehold, shall be charged pursuant to the declaration hereinbefore contained; is the sum of £358 16*s.*, and that the part thereof with which the said secondly-mentioned leasehold shall be charged is the sum of £1002, and it further appearing that the defendant Joseph Richard O'Reilly, has been in the enjoyment of the said leasehold interests for the period of 25 years, and that accordingly the amount which he is liable to contribute to the said sum of £358 16*s.*, in respect of such past enjoyment, is the sum of £125, being 25 times the annual sum of £5, such last-mentioned sum of £5 being the one seventy-second part of the said sum of £358 16*s.*, and that the amount which he is liable to contribute to the said sum of £1002, in respect of such past

enjoyment, is the sum of £177 14*s.* 2*d.*, being 25 times the annual sum of £9 2*s.* 2*d.*, being the one hundred and tenth part of the said sum of £1002, the said two sums of £125 and £177 14*s.* 2*d.*, making together the total sum of £302 14*s.* 2*d.*, and it further appearing that the said defendant is now in his 52nd year, and that according to the tables to the Succession Duty Act of 1853 the present value of an annuity on the life of the said defendant of £14 2*s.* 2*d.*, being the aggregate of the said annual sums of £5 and £9 2*s.* 2*d.*, would be £167 5*s.* 7*d.*, and the said defendant submitting to the amount of his contribution in respect of his future enjoyment of the said leaseholds being taken at the said last-mentioned sum of £167 5*s.* 7*d.*, this Court doth declare that the said defendant is chargeable therewith accordingly; and it appearing that the said defendant has advanced out of his own moneys, in respect of the administration of the testator's estate, the sum of £2105 3*s.* 1*d.*, and that the same is due to him, this Court doth further declare that the said several sums of £125, £177 14*s.* 2*d.*, and £167 5*s.* 7d., making together the sum of £469 19*s.* 9*d.*, shall be set off against an equal amount of the said sum of £2105 3*s.* 8*d.*, and that the balance due to the said defendant shall be accordingly declared to be the sum of £1635 3*s.* 4*d.*; and this Court doth declare the plaintiff and the respective defendants entitled to their respective costs of the hearing of this application, including the hearing at Chambers with counsel and the adjournment thereof into Court, and including fees to their respective counsel on the settlement of the notes of this order as part of their costs in this action, the said respective costs to be taxed as between solicitor and client."

Solicitors for the plaintiffs: *E. & G. Stapleton.*

Solicitors for the defendant Joseph Richard O'Reilly: *O'Hagan & Son.*

Solicitors for the defendant Joseph James O'Reilly: *Baker & Ringwood.*

W. L.

V.-C.
1895.
Jan. 21.

WALSH *v.* RYAN.

(1894. No. 745.)

Practice — Trial by jury — Action in Chancery Division for injunction — Order XXXVI., Rule 3—Transfer to Common Law Division.

An action was brought in the Chancery Division for an injunction to restrain certain nuisances and trespasses to the plaintiff's premises, situate in the City of Dublin, and the obstruction of a way or passage and the access of light and air thereto, and for damages. The defendant applied for an order for a trial with a jury, and that they should visit the premises; or, that the action should be transferred to a Common Law Division:—

Held, that under Order XXXVI., Rule 3, the Court had a discretion as to ordering a trial with a jury; that the onus lay on the person requiring a jury of establishing the propriety of having a trial by such a tribunal; that under the circumstances the defendant had not discharged that onus, and that a trial with a jury should not be ordered:—

Held also, that the action should not be transferred to a Common Law Division.

Differences between the Irish and English Rules as to right to trial by jury considered.

Motion by the defendant that the trial of the action be had by the Vice-Chancellor and a common jury of the city of Dublin, and that the said jury visit the premises alleged to be injured by the defendant; or that the action be transferred to a Common Law Division.

The action was brought for an injunction to restrain the defendant from (*a*) using or permitting to be used a certain urinal or water-closet on the defendant's premises in Merrion-row, Dublin, so as to be a nuisance to the plaintiff's adjoining premises, (*b*) discharging certain noxious matter from the said urinal or closet in and upon the plaintiff's said premises; (*c*) wrongfully obstructing a certain private way or passage at the rere of the premises known as the Shelbourne House, Merrion-row, and obstructing the access of light and air to and through the said

passage; (*d*) trespassing on the plaintiff's premises and erecting a certain shed and ventilator on the plaintiff's wall; and for damages.

The statement of claim alleged that the defendant had erected a urinal and water-closet immediately adjoining the plaintiff's dining-room and so close to the side wall thereof that the water-closet could not be used without the pumping of the cistern being heard in the plaintiff's dining-room: the urinal and water-closet had been so constructed that noxious matter from the same permeated through the wall of the plaintiff's house partially destroying same, and rotted and destroyed the paper, and ran down on the inside of the basement wall of the house. There was a covered passage at the rere of the plaintiff's premises used by him and the occupier of the defendant's premises in common for over twenty years. Until recently there was a door or gate at the entrance to the said passage which was rarely locked, and which permitted the access of light and air to the said passage. The defendant recently placed at the said entrance a solid gate or door and kept the same locked, and the plaintiff was prevented from using the passage, and the access of light and air thereto was obstructed: the defendant erected a shed and ventilator, and fixed the same to the flank wall of the plaintiff's house, and drove beams and supports into the said wall.

The defence, besides traversing most of the allegations in the statement of claim, alleged, amongst other matters, that the urinal and water-closet had been erected and used for upwards of fifteen years without complaint by the defendant, and were of the best construction; the passage was all under ground and was covered with a solid brick roof; the solid gate or door was erected more than three years previously, and with the knowledge of the plaintiff; the defendant had given a key of the door to the plaintiff when he asked for same; the plaintiff had two doors opening into the passage from his own premises; the defendant had not interfered with or obstructed the access of light and air to the passage; any interfence or obstruction had been caused by the boarding up of the two doors on the plaintiff's premises; the shed and ventilator had been erected a considerable time previously with the knowledge and approval of the plaintiff.

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Affidavits were filed on both sides by the parties and skilled witnesses in reference to the matters complained of. The defendant alleged that a view jury was absolutely necessary for the determination of the matters in dispute, and charged that the plaintiff had deliberately brought the action in the Chancery Division in order to deprive the defendant of a jury and a view jury. This the plaintiff denied, and he alleged that the defendant's object in seeking for a jury was in the hope that there might be a disagreement.

The Right Hon. John Atkinson, Q.C. (with him *R. P. Carton, Q.C.*, and *P. Law Smith*) in support of the application:—

The case is one which should be tried by a jury, and moreover a view of the premises will be absolutely necessary for the determination of the questions in dispute. The action ought to be tried by this Court with a jury, or be transferred to a Common Law Division: *Jenkins* v. *Bushby* (1).

Wright, Q.C. and *Kenny, Q.C.* (with them *Daniel Kehoe*) for the plaintiff.

The cases of *Hamilton* v. *Attorney-General* (2) and *Daly* v. *Murray* (3) were tried by this Court without a jury. On this point see the judgments of May, C.J., and Deasy, L.J., in the former case on appeal (4). See also *Boyd* v. *Phelan* (5). The cases of *Timson* v. *Wilson* and *Fanshawe* v. *London and Provincial Dairy Company* (6) apply. This is essentially a Chancery action. Further, the Court can if necessary inspect the premises: Order L., Rule 5. This power was exercised by the Court of Appeal in *Verner* v. *Cochrane* (7). Moreover, the rules in this country are different from those in England. The Irish Order XXXVI., Rule 3, includes cases intermediate between those assigned by the Judicature Act to the Chancery Division and those which the parties are entitled as of right to have tried with a jury. The principal cause of action here is not one directed by section 36 of the Act to

(1) [1891] 1 Ch. 484.
(2) 5 L. R. Ir. 555.
(3) 17 L. R. Ir. 185.
(4) 9 L. R. Ir. 271, at pp. 287, 288.
(5) 17 L. R. Ir. 538.
(6) 38 Ch. D. 72.
(7) Not reported. 1888. No. 9912.

be assigned to any particular Division; the plaintiff was entitled to assign his action to any Division he pleased; Rule 3 of Order XXXVI. applies; the question of a jury is one for the discretion of the Court; the onus lies on the defendant to show the necessity for a jury, and he has not discharged that onus: see *Gardner* v. *Jay* (1). There the principal question was whether the case came under Rule 3 or Rule 6 of the English Order XXXVI., but even if this case would fall under the latter rule in England, here it comes under Rule 3, and *prima facie* the case should be tried without a jury.

Law Smith in reply:—

This action should have been brought in a Common Law Division. It is a simple action for trespass and nuisance. The injunction claimed is a remedy merely; it is not a separate cause of action: *Ex parte Martin* (2); *Martin* v. *Bannister* (3). The causes of action here are not such as are by the Judicature Act directed to be assigned to the Chancery Division. If the plaintiff had brought the action in a Common Law Division the defendant would have been entitled to have the case tried by a jury. The proceedings have been taken in this Division either by accident or for the purpose of depriving the defendant of a trial by a jury, and in either case the defendant's application ought to be granted. The cases on the subject were cited in *Jenkins* v. *Bushby* (4).

THE VICE-CHANCELLOR:—

I do not think that any case has been made to support this application. In the first place I shall rule on the original application that the trial shall be by myself without a jury. I have full discretion as to this. The case of *Jenkins* v. *Bushby* (4), does not apply. The Irish rule is the converse of the English, and was made deliberately by the judges on full consideration with the view of throwing the onus on the person requiring a jury of establishing the propriety of having the case tried by such a tribunal. Rule 3 of the Irish Order XXXVI. includes not only causes assigned by the Judicature Act to the Chancery Division,

(1) 29 Ch. D. 50.
(2) 4 Q. B. D. 212.
(3) 4 Q. B. D. 491.
(4) [1891] 1 Ch. 484.

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but also the class intermediate between them and causes which a party is entitled as of right to have tried with a jury; and in this intermediate class a plaintiff has the right to choose in which Division he will sue, and if he elects to sue in the Chancery Division, the proceedings must be regulated by the practice applicable to actions there.

In the exercise of my discretion, I am of opinion that this case can be more conveniently tried without a jury, and that it is one of those cases which could not be satisfactorily tried by a jury. A view of the premises would not be necessary. Maps and plans would present a sufficiently clear idea of the matters in question. There is also this conclusive answer, that should it become necessary to have a view of the premises, I have power myself to inspect them.

As to the alternative application to transfer the action to a Common Law Division it would be to decline to entertain one of the largest heads of jurisdiction possessed by this Division, namely, that relating to injunctions. There is nothing special in the case to induce me to do so. My duty is to try such cases as come before me, and I shall do so.

I refuse the motion with costs.

Solicitor for the plaintiff: *Michael L. Hearn.*
Solicitor for the defendant: *William Burke.*

D. M'C. M.

M. R. 1894. July 25.

JESSOP *v.* SMYTH.

(1893. No. 420.)

Practice—Specific performance—Defaulting defendant—Conveyance to be executed as an escrow, and to be handed over on payment of purchase-money to plaintiff—Form of order.

In a vendor's action for specific performance the defendant, not having complied with the decree, was ordered to pay the purchase-money into Court within a limited time. The defendant did not comply with this order, and

efforts to enforce it by sequestration proved ineffective. An application was then made for an order for payment of the amount to the plaintiff, so that if default was made a writ of *fi. fa.* could issue.

The Court made an order for a conveyance to be executed as an escrow, and delivered on payment of the purchase-money and interest, and for payment to the plaintiff by the defendant, at a time and place to be fixed by the judge, after the execution of the conveyance; and by a subsequent order, the conveyance having been executed, the defendant was ordered to pay the purchase-money and interest to the plaintiff within one month from the date of the order.

MOTION.

This was an action by a vendor for specific performance by a purchaser of an agreement dated the 18th of July, 1892, for the sale of certain leasehold property known as the Balgooley Distillery, situate in the county of Cork.

The defendant put in no statement of defence, but appeared on the plaintiff's motion for judgment in default of defence on the 4th day of July, 1893, when a decree for specific performance was made, and it was ordered that a proper conveyance from the plaintiff to the defendant be executed, the same to be settled at Chambers if the parties differed as to the form thereof, and that upon execution thereof the defendant do pay to the plaintiff the sum of £4702, being the balance of the purchase-money of the premises, together with interest at the rate of 5 per cent. per annum from the 29th September, 1892, until paid, together with his costs when taxed and ascertained; stay of proceedings for two months; liberty to apply.

The defendant not having complied with the decree, an order was made on the 19th of December, 1893, on the application of the plaintiff, that the defendant should lodge the said sum in Court, togther with interest up to the date of lodgment, on or before the 11th day of January, 1894.

On the 27th of January, 1894, an order was made extending the time for complying with the said order of the 19th day of December, 1893, for four days after service of that order and the said order of the 19th of December, 1893. The defendant not having complied with the said order, steps were taken to enforce it by writ of sequestration against the estate and effects of the defendant, but no person could be found who was in a position to

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give the requisite security, or for the performance of whose duties as sequestrator a guarantee society was willing to enter into the required bond. From the result of inquiries it appeared that there was no prospect of re-selling the premises. This application was accordingly made to the Court for an order for payment to the plaintiff of the balance of the purchase-money, and interest thereon as directed by the decree, and that upon payment of the said balance and interest, together with the costs of the action when taxed and ascertained, the plaintiff should execute a conveyance of the premises to the defendant, and deliver over to the defendant all deeds and documents in the custody of the plaintiff relating to the premises.

William Lawson, in support of the motion :—

The order for payment of the purchase-money and interest into Court having proved ineffective, the Court can make an order for payment of the amount to the plaintiff direct, which can then be enforced by writ of *fieri facias* directed to the sheriff: *Robinson* v. *Galland* (1); *Morgan* v. *Briscoe* (2); *Walker* v. *East Riding Club* (3). In the last case the Court made the preparation of the conveyance conditional on the money being first paid.

THE MASTER OF THE ROLLS said that he would not dispense with the preparation and execution of the conveyance, but that he would make an order similar to that in *Robinson* v. *Galland* (1), the minute of the order to be prepared by counsel and handed in.

The following order was made ;—

"THIS COURT doth order that the plaintiff prepare and execute a conveyance to the defendant (as an escrow to be delivered to the defendant, on payment of the purchase-money, interest, balance on taking the account hereafter mentioned, and costs as hereinafter mentioned) of the premises comprised in the contract in the said judgment mentioned, such conveyance to be submitted to the defendant's solicitors for approval, and to be returned by them approved within one week from receipt thereof, and that in default of the return

(1) 31 W. R. 396.
(2) 31 Ch. D. 266.
(3) Seton on Decrees, vol. 3, p. 1864.

thereof within the said time such conveyance be deemed approved by the defendant, and in the event of the parties differing as to the form thereof that the same be settled by the Judge, and this Court doth further order that the defendant pay to the plaintiff at a time and place to be appointed by the Judge, when the said conveyance shall have been so approved or settled as aforesaid, the sum of £4702, being the balance of the purchase-money in the said judgment mentioned, together with the sum of £420 8*s*. 9*d*., being interest on the said sum of £4702 from the 29th September, 1892, to the 30th July, 1894, together with further interest at the rate of 5 per cent. on the said sum of £4702, from the 30th July, 1894, and the costs of this action when taxed and ascertained. And this Court doth further order that an account be taken of what is due to the plaintiff for all payments properly made by him pursuant to the conditions of sale for head-rent, insurance, and other outgoings in respect of the said premises since the 29th day of September, 1892, and also an account of the rents and profits, if any, of the said premises received by the plaintiff, or by any other person or persons by the order of, or for the use of the plaintiff since the said 29th day of September, and that the amount of the said rents and profits be deducted from the amount of payments made by the plaintiff, and that the balance be certified, and that the defendant do pay the said balance within one month from the date of the Chief Clerk's certificate to be made in pursuance of this order, and upon such payments being made by the defendant to the plaintiff it is ordered that the plaintiff deliver to the defendant the said conveyance duly executed by him, together with all deeds and writings in his custody or power relating to the said premises, and that the costs of and incidental to this application and order, including the preparation of this order by counsel, and the costs of preparing the said conveyance by the solicitor for the plaintiff be part of the plaintiff's costs of this action, and that the plaintiff be at liberty to apply to the Vacation Judge for any order necessary for carrying out this order." (1)

Solicitor for the plaintiff: *R. W. Peebles.*
Solicitors for the defendant: *Bass & Co.*

W. L.

(1) On the 25th day of September, 1894, an order was made by Madden, J., as Vacation Judge, for the Master of the Rolls, that the defendant do within one month from that date pay to the plaintiff at the office of the plaintiff's solicitor, No. 5 North Frederick-street, Dublin, the sums of £4702, and £420 8*s*. 9*d*., in the said order of the 25th day of July, 1894, mentioned together

Appeal.
1894.

July 16.
Dec. 18.

MOORE *v.* SMITH (1).

Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 3—*Judicature Act* (*Ireland*) 1877 (40 & 41 *Vict. c.* 57), *s.* 28, *sub-s.* 1—*Administration action—Insolvent estate.*

In an action in which the estate of a testator who had died insolvent was being administered, the testator's widow claimed as a creditor of the estate in respect of a loan made by her to the deceased out of her separate estate during coverture :—

Held (affirming the decision of the Master of the Rolls), that the claim of the widow in respect of this loan was not postponed to the claims of the other creditors of the estate by the joint operation of the Judicature Act (Ireland), 1877, section 28, sub-sect. 1, and of the Married Women's Property Act, 1882, section 3.

Appeal from an order of the Master of the Rolls, dated March 16, 1894, asking that the same should be varied by ordering that the Chief Clerk's certificate referred to therein should be varied only to the extent of admitting the claim of Catherine Moore as a creditor of the estate of Thomas B. Moore, the testator in this action, for £300 instead of £900.

Thomas B. Moore, the testator, had died in insolvent circumstances. This action was brought to have his estate administered in the Chancery Division. Prior to their marriage his wife had advanced him a sum of £300, and after their marriage she had lent him out of her separate property two several sums of £200

with further interest on the said sum of £4702, from the 13th day of July last, at the rate of 5 per cent. per annum, and it was ordered that the plaintiff's costs of, and incidental to, the motion be part of the plaintiff's costs in the action. This order was made on an affidavit by the plaintiff's solicitor, stating that the conveyance had been prepared and executed by the plaintiff as provided by the said order of the 25th day of July. The defendant did not comply with the order of the Vacation Judge, and a writ of *fieri facius* was afterwards issued to enforce payment of the amounts directed by the said order to be paid.—Rep.

(1) Before Walker, C., and Fitz Gibbon and Barry, L.JJ.

and £400. These loans had not been repaid at the time of his death.

Before the Chief Clerk the widow claimed as a creditor of the estate for £900. This claim was disallowed by the Chief Clerk's certificate. The widow then issued a summons seeking to have the certificate varied by allowing her claim. This summons was adjourned into Court, and after argument the Master of the Rolls varied the said certificate by admitting the claim of the widow as a creditor of the estate for £900. From this order the present appeal was taken.

P. F. White, Q.C., and *Rosenthal*, for the appellant.

Cuming, for the respondent.

[The following cases were cited:—*In re May, Crawford* v. *May* (1); *Ex parte Mills, In re Tew* (2); *Ex parte Taylor, In re Grason* (3); *Mersey Steel and Iron Co.* v. *Naylor* (4); *Re Albion Steel Co.* (5); *In re Knott* (6); *Re Maggi, Winehouse* v. *Winehouse* (7); *Re Crumlin Viaduct Works Co.* (8); *Lee* v. *Nuttall* (9); *Smith* v. *Morgan* (10); *In re Macfarlane's Claim* (11); *Scott* v. *Murphy* (12); *In re Count D'Epineuil* (13); *In re Bridges, Hill* v. *Bridges* (14).]

Dec 18.

WALKER, C.:—

The facts of this case are not in dispute, and on the appeal a question of law only was raised.

The assets of Thomas B. Moore, who died in insolvent circumstances, are being administered in an action in the Chancery Division. Catherine Moore, his widow, claims to prove as a creditor of the deceased for a sum of £900. As regards £300, portion of that amount, which was advanced by her to her

(1) 45 Ch. D. 499.
(2) L. R. 8 Ch. 569.
(3) 12 Ch. D. 366.
(4) 9 Q. B. D. 648; 9 App. Cas. 434.
(5) 7 Ch. D. 547.
(6) 7 Ch. D. 549, *n.*
(7) 20 Ch. D. 545.
(8) 11 Ch. D. 755.
(9) 12 Ch. D. 61.
(10) 5 C. P. D. 337.
(11) 17 Ch. D. 337
(12) 13 L. R. Ir. 10.
(13) 20 Ch. D. 217.
(14) 17 Ch. D. 342.

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husband before their marriage, her right was not here disputed. Two several sums, however, one of £200 and one of £400, were advanced by her to Thomas B. Moore after their marriage, and to the total of these several advances, that is the sum of £600, this appeal relates.

The claim was resisted and the appeal supported by arguments founded on the combined operation of sect. 3 of the Married Women's Property Act, 1882, and of sect. 28 of the Judicature Act (Ireland), 1877. The section of the Married Women's Property Act, 1882, to which I have referred, provides that any money lent by a wife to her husband for the purposes of his trade or business, or otherwise, shall be treated as assets of the husband in case of his bankruptcy, but reserves her right after all other creditors for valuable consideration or money's worth have been paid to prove against the estate, and be paid so far as the assets will extend. This provision, which displaces a right *prima facie* existing and confiscates the wife's property, is limited to the case of the husband's bankruptcy, and of itself has no application here, as Thomas B. Moore did not become bankrupt. But the appellant relies on sect. 28 of the Judicature Act (Ireland), 1877, the first sub-section of which provides that "in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any Company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt in Ireland; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such Company, may come in under the decree or order for the administration of such estate, or under the winding-up of such Company, and make such claims against

the same as they may respectively be entitled to by virtue of this Act."

The interpretation of this section as applicable to insolvent estates under administration in the Chancery Division and to insolvent Companies which are being wound-up has led to considerable discussion in England, and words which are apparently wide have received a limited construction. It was early decided that the bankruptcy law as a whole was not applied to administration and winding-up in the Chancery Division:—for instance the rules in bankruptcy as to reputed ownership: *In re Crumlin Viaduct Works Co.* (1), and as to the right of a landlord to recover a year's rent accrued due before the bankruptcy: *In re Coal Consumers' Association* (2), have been held not to apply to the winding-up of Companies. Then the words, "rights of secured and unsecured creditors" were held to mean only such rights *inter se*, and not to extend to the case of an executor claiming a right to retain: *Lee* v. *Nuttall* (3), nor to give effect to the bankruptcy rule in the case of goods taken in execution by the sheriff before a winding-up; this last point being settled after a conflict of authority by *In re Withernsea Brick Works* (4) in the Court of Appeal. On the other hand, in *The Association of Land Financiers* (5), Malins, V.C., held that the rule in bankruptcy that servants' wages should be paid in priority to all other debts was extended to the case of a Company being wound-up: while in *The Albion Steel and Wire Co.* (6), Sir George Jessel held that the bankruptcy rule giving local rates priority over debts was not applied to Companies in liquidation. The way he puts it is that sect. 10 of the Act of 1875—the corresponding English enactment—does not import into administration a bankruptcy preference.

The next question that arose was whether the provisions of that section of the Bankruptcy Act, which made all debts with certain exceptions payable *pari passu*, were imported into administration actions, and the question was answered in the negative in *Winehouse* v. *Winehouse* (7). That was the case of a creditor who

(1) 11 Ch. D. 755.
(2) 4 Ch. D. 625.
(3) 12 Ch. D. 61.
(4) 16 Ch. D. 337.
(5) 16 Ch. D. 373.
(6) 7 Ch. D. 547.
(7) 20 Ch. D. 545.

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had recovered judgment for his debt against the executor, after the date of the judgment in an administration action, and it was held by Fry, J., that he retained his priority.

The case of *Crawford* v. *May* (1) involved the consideration of the 3rd section of the Married Women's Property Act, 1882, as applicable to insolvent estates in this way:—The widow of a trader, his administratrix, had advanced money to him out of her separate estate for his business, and she claimed to retain the amount out of assets in her hands. It was contended that the debt had been made an inferior debt, and that, therefore, the right of retainer could not be exercised: but North, J., held that the right of retainer was unaffected, leaving untouched the question of her right of proof if she were seeking to prove for a debt.

We were much pressed by the observations of the Judges in the *Mersey Steel and Iron Co.* v. *Naylor* (2). The facts of that case are material. There was an agreement by the plaintiff—the Company—with the defendants to sell and deliver to them certain goods by certain quantities at stated times. A petition was presented to wind up the Company and an order made. The Company subsequently sued the defendants for the price of goods delivered, and the defendants counter-claimed, claiming unliquidated damages for breach of contract. One of the questions discussed was whether if the defendants had proved in the winding-up for their damages, their proof would have been regulated by the mutual credit sections of the Bankruptcy Act, so that the debt for the goods would have been deducted from the claim, and a proof for the surplus only allowed. It was held that the section of the Judicature Act would have applied this Bankruptcy rule. The words, "as to debts and liabilities provable," were interpreted to mean, "what debts and liabilities can be proved, and the manner in which they are to be proved." The mode of proof would be the thing in controversy where there were claims on both sides. It was not there the importation of a bankruptcy enactment displacing priority or prohibiting a claim. Lord Selborne, in the House of Lords, (3) says:—"We find that among the rules which are to be imported from bankruptcy

(1) 45 Ch. D. 499.

(2) 9 Q. B. D. 648; 9 App. Cas. 434.

(3) 9 App. Cas. 437-8.

there are included the rules 'as to debts and liabilities provable.' Is not the rule in question one as to debts and liabilities provable? It occurs in that division of the Bankruptcy Act, 1869, which is under the sub-heading 'Payment of debts and distribution of assets.' The first section under that head is one which, following a series of earlier statutes, makes demands in the nature of unliquidated damages, arising by reason of contract, provable in bankruptcy, and similar demands which do not so arise and are not of that nature not provable. The Act defines what are to be proved—all debts and liabilities and obligations, except certain things which are excepted—there are two or three clauses dealing with special matters, and then we come to the 39th, which occurs under the same division of the statute. 'Where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other, and the balance of such account, *and no more*, shall be claimed or paid on either side respectively.' Your Lordships observe that it is not that it *may be* —it is not a thing which is optional, but it is a positive absolute rule for the purpose of proof in bankruptcy, and nothing can be proved according to that rule in such cases except the balance of the account: that only is regarded as the claim which it is competent for the creditor to make when he comes in to prove under the bankruptcy. That being so, how is it possible to say that this is not a rule, both within the general spirit and intention of the section and within the express words 'as to debts and liabilities provable'? I do not think it necessary to say more upon that subject."

Now let us recur to section 3 of the Married Women's Property Act, 1882. The money lent by the wife is to be treated as "assets of her husband's estate in case of his bankruptcy," that is his estate is *pro tanto* enlarged: while her debt is confiscated and goes into the assets. But the cases seem to have settled that the section of the Judicature Act does not make any change in the question what the assets are which are to be administered

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in the Chancery Division. The reputed ownership clause is not applied by the section to cases of administration: nor is the law as to fraudulent preference, nor the law as to unregistered bills of sale. Furthermore, if the contention of the appellant were well founded, it seems strange that in 1882 when the Legislature was introducing this new rule it did not say that it should be applicable to insolvent estates under administration in the Chancery Division, especially as the limited operation of the section of the Judicature Act in many somewhat analogous cases was then fixed by the decisions. I have felt considerable difficulty in this case, and if I considered myself unfettered by decision, I should be disposed to hold that the contention of the appellant is sustained by the wide language of the Acts in question; but, upon the whole, whatever my opinion might have been if the application of the section of the Judicature Act were *res integra*, I think that I am acting more in harmony with the English authorities by accepting the interpretation of the section adopted by the Master of the Rolls.

I am accordingly of opinion that the appeal should be dismissed.

FITZ GIBBON AND BARRY, L. JJ., concurred.

Solicitor for the appellant: *Rosenthal.*
Solicitor for the respondent: *O'Farrell.*

G. Y. D.

M. R. 1895. Feb. 6, 26.

BRERETON *v.* DAY.

(1894. No. 902.)

Specific devise of leasehold—Covenant to keep in repair—Breach of covenant by testatrix—Cost of repairs—Tenant for life and remainderman—Trustees of residuary estate.

As between a tenant for life of a leasehold, specifically bequeathed, and the general assets of a testator there is no equity in favour of the latter to throw on the former the obligation of putting the leasehold premises, which were dilapidated at the time of the testator's death, into repair.

LADY FITZGERALD of Merrion-square, in the city of Dublin, widow, made her last will dated 24th August, 1893, whereby she

appointed the plaintiffs to be the executor and executrix thereof and directed them to set apart out of her general estate and effects a sum of £1000, and to hold the same upon trust for investment and to pay the annual interest or dividends thereof unto the plaintiff, Maria O'Grady, for her life, the capital on her decease to fall into the testatrix's residuary estate. And the testatrix further directed that, in the event of the said Maria O'Grady electing, under the gift thereafter made, to reside in her house in Merrion-square her trustees were to set apart in securities authorized by law for trustees, a sum of £5000, and to pay the interest thereof to the said Maria O'Grady for her life, or for such shorter period as she might make the said house her principal residence; and upon her decease, or ceasing to make the said house her principal residence (of which fact the personal representatives of the testatrix for the time being were to be the sole judges, and their decision final), the said sum was to fall into the testatrix's residuary estate. And the testatrix directed that her trustees should stand possessed of her house and premises in Merrion-square, and all the contents of every description (save those articles she specifically disposed of) upon trust, to permit the said Maria O'Grady, if she should so desire, to make the said house and premises, with the contents thereof, her residence during her life, subject to her paying the head-rents and other outgoings, and without her being liable for any loss or depreciation of the articles so contained in said house; and after her decease, or in case she should not desire to occupy and use said house and its contents, or should cease to do so, then, in either event, the said house should form part of the residuary property, and, save as therein-mentioned, the articles of furniture and other effects then in said house should go to her nephew, Dr. Edward Stamer O'Grady, and the testatrix desired him to consider them as heirlooms, and in case of his death during her lifetime, or during the life and occupancy of said house of the said Maria O'Grady then the same, on the death of or cesser of occupancy by the said Maria O'Grady, should go between his two sons, Stamer O'Grady and Guillamore O'Grady, in equal shares, and the testatrix desired them to consider the same as heirlooms, or in case of the death of either before that gift should fall into them, then the entire to the

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survivor as heirlooms. The testatrix after bequeathing £5000 to Dr. O'Grady for life, and after his death to his sons (directing that his receipt should be a complete discharge to her executors for said sum) bequeathed certain legacies and gave directions that certain diamonds in the will particularly described and all other jewellery not thereby disposed of and her black and white lace should be sold in London by her executors at the end of two years after her death, and the proceeds (less three legacies of £200 each, thereinafter mentioned), paid to the said Maria O'Grady to be by her applied to such charitable or religious purposes in Ireland as she should see fit. After certain charitable and specific bequests testatrix gave and bequeathed all the rest, residue, and remainder of her property of what kind soever which she might be seised, possessed of, or entitled to, including her said house, No. 29 Merrion-square, and other property, subject to the life estates thereinbefore given, and not given over otherwise, to the defendants, subject to the payment of her debts, funeral, and testamentary expenses, upon trust, to pay and apply the residue, or the proceeds thereof when realized by sale or otherwise, for the use of the Church of Ireland, in the counties of Limerick or Clare, in such proportions as they should see fit, with full and uncontrolled discretion in the distribution or application of the principal and income of said bequest, as therein-mentioned.

Testatrix died 5th May, 1894, and probate of the will and of a codicil (which she had added to the will) was granted to the plaintiffs on 10th August, 1894.

The plaintiffs claimed that the trusts of the will and codicil of the testatrix should be carried into execution, and her personal estate administered, and submitted certain questions for the decision of the Court. The first and only one now material was as follows:—The said house, No. 29 Merrion-square, is held under a lease dated the 30th March, 1839, for the unexpired residue of a term of ninety-nine years from 25th March, 1839, and the said lease contains a covenant on the part of the lessee to keep the said house and offices in repair. The said house and offices were at the death of the testatrix, and are at present, out of repair, and a considerable sum would be required to put the same into repair. The plaintiffs are desirous of obtaining the directions of this Honorable

Court as to who is liable to put the same into repair, and whether in case the plaintiff, Maria O'Grady, expends money in putting the said house and offices into repair she is entitled to have the same, or some part thereof, charged upon the interest of the lessee in the said lease.

Serjeant Jellett, Q.C. (with him *J. W. Richards*) for the plaintiffs:—

The principal question now presented for decision is as to the cost of putting the house in Merrion-square into repair in accordance with the covenant contained in the lease of 30th March, 1839, under which the premises are held. We submit that the cost of these repairs ought not to fall on Maria O'Grady, the tenant for life of the leasehold premises. A covenant to keep in repair deals with the preservation of a house in a proper and sanitary condition, and the effect of such a covenant is that if the premises are dilapidated at the time the covenant was entered into they must be put into repair: *Payne* v. *Haine* (1); which was followed in *Proudfoot* v. *Hart* (2). The premises had fallen into disrepair during the lifetime of the testatrix, Lady Fitzgerald, and she while alive would have been answerable for such breach of covenant, and the defendants as trustees are now bound—1, to observe the covenants of the lease; and 2, on behalf of those interested under the will to preserve the estate from forfeiture. The cost therefore of the necessary repairs must fall on them to be defrayed out of the residuary personal estate of the testatrix. It is contrary to the range of authority that the expenses of such repairs should be thrown upon the tenant for life: *Harris* v. *Poyner* (3); *Re Hotchkys* (4); *Re Courtier; Coles* v. *Courtier* (5); *Re Baring; Jeune* v. *Baring* (6); *Hickling* v. *Boyer* (7); *Hawkins* v. *Hawkins* (8).

Serjeant Campion, Q.C. and *Blood*, for the defendants, representing the residuary estate devised for certain charitable purposes:—

The specific devisee of the leasehold takes it *cum onere* and is

(1) 16 M. & W. 541.
(2) 25 Q. B. Div. 42.
(3) 1 Dr. 174.
(4) 32 Ch. Div. 408.
(5) 34 Ch. Div. 136.
(6) [1893] 1 Ch. 61.
(7) 3 MacN. & G. 635.
(8) 13 Ch. Div. 470.

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liable for the cost of the repairs. The ordinary liability between landlord and tenant as to expenditure is no criterion ; the criterion is the amount by which the reversion is then and there deteriorated ; Woodfall, Landlord and Tenant, p. 635. In *Harris* v. *Poyner* (1) there was no specific gift of a leasehold to a particular person for life, and that constitutes a distinction between that and the present case ; see pp. 181 and 182 of the report ; and see *Re Hotchkys* (2) ; *Re Fowler* (3).

Even if the entire cost of the repairs cannot in this case be thrown on the tenant for life, in accordance with the equitable doctrine of the Court in distributing burdens between a tenant for life and remainderman some division of the expenses of necessary repairs should be made. If the trustees are ordered to defray the cost of the repairs, interest on such sum should be paid by the tenant for life during her enjoyment of the premises. *Re Hotchkys* (2) shows that the Court has a discretion to make such equitable order. See the judgments in that case.

In *Re Baring ; Jeune* v. *Baring* (4), where *Re Courtier* was reluctantly followed by Kekewich, J., the lease was renewable for ever ; here it is a wasting asset.

J. W. Richards in reply :—

In *Re Courtier ; Coles* v. *Courtier* (5) the question to be decided was the same as in the present case, and it is conclusive on the point. In *Re Fowler* (3) the facts were different, the house in question there had fallen into disrepair after the death of the testator.

Feb. 26.

THE MASTER OF THE ROLLS :—

The only question remaining for decision at present is as to the cost of putting the leasehold house in Merrion-square into repair, pursuant to the covenants contained in the lease of 30th March, 1839.

Does the devisee for life take the house as she finds it *cum onere?* or is the cost of repairing to be borne by the tenant for life and the

(1 1 Dr. 174.
(2 32 Ch. Div. 408.
16 Ch. Div. 723.
(4) [1893] 1 Ch. 61.
(5) 34 Ch. Div. 136.

remainderman in proportion to their respective interests? or is the cost of effecting the needful repairs to be defrayed out of the testatrix's residuary personal estate, so as to give the tenant for life possession of the dwelling in that condition in which it would have been if the testatrix had maintained it conformably to her covenant?

The first case on the point to which it is necessary to refer is *Harris* v. *Poyner* (1), which was a decision of Kindersley, V.C. The case has some facts which closely resemble the present, and the decision has the authority of an eminent Judge. At page 181 he says:—"The testator, at the time when he died, having been in the possession, or the holder of this leasehold property, had, in violation of the covenants in the leases under which he held, suffered the property to fall into dilapidation; and it appears by the Master's report, that the amount of the dilapidation which had occurred at the time when the testator died was £900. He had violated his covenants; and I must assume that the testator would have been liable to the landlord in an action for damages for breach of covenant. Shortly after the testator's death, the landlord seems to have made application to the widow, and to have given formal notices to her, and to have called upon the parties to make good the dilapidations; upon which the widow and the son together took measures, the effect of which is that the widow, as I understand, paid the amount of the dilapidations—not all in one sum, but paid them by degrees, so as to satisfy the landlord's demand. Then comes the question, Is the widow to bear that expense out of her own pocket, or is it to be borne by the testator's residuary estate? Now the cases which have been cited, I confess do not appear to me to govern the present case. Whether in the case of a dry specific legacy of a separate leasehold, where the testator was liable for dilapidations at the time of his death—whether as between that specific legatee and the person entitled to the general residue of the personal estate, the specific legatee should discharge that amount of dilapidation out of the general estate or not—the principle of such a case does not appear to me to govern the present case at all. In the case before Lord Truro,

(1) 1 Dr. 174.

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Hickling v. *Boyer* (1), his Lordship decided against the specific legatee, principally upon the terms used in the will, though he certainly goes on to say that, irrespective of those terms, and upon general principle, he should still have decided the same way; and I must assume that to be right. But, assuming it to be right (although, I confess, if it had been *res integra*, I should have questioned it very much—not upon the terms of the will in that case, but upon the general principle), that was a question as between the specific legatee of a separate leasehold, and the residuary legatee of general personal estate. Here it is a question as between the tenant for life and the remainderman or the reversioner, of an aggregate mass of property, all constituting the residuary real and personal estate, of which the leaseholds in question form only a component part"; and he accordingly decided that the repairs were to be borne by the residue and not by the tenant for life.

Hickling v. *Boyer* (1) was a devise of leaseholds—"subject to the performance of the covenants," &c. The residue was subject to payment of debts. The legatee took *cum onere*, including liability for repairs. Lord Truro decided the case not only on the terms of the gift, "subject," &c., but on general principles. But the case was not one of tenant for life and remainderman, or tenant for life and residuary legatee; but merely as between a specific gift of leaseholds and the general residuary estate. And it is noticeable that a fund was set apart to protect the executors in case the specific legatee did not perform the obligation.

Re Courtier; Coles v. *Courtier* (2) (distinguishing *Re Fowler* (3)) decided there was no liability on the tenant for life to put in repair. Cotton, L. J., says—"With respect to that question, it is admitted that the words of the will are such that it cannot be contended that there is a trust for immediate conversion; but it is said that if the widow is to have the right to possess the leaseholds in specie, during her lifetime, she is bound to spend her money in putting them into sufficient repair, to satisfy the covenants of the leases. I think that there is no such obligation on her. She is not bound to the landlords under the covenants; the trustees are

(1) 3 MacN. & G. 635. (2) 34 Ch. Div. 136. (3) 16 Ch. Div. 723.

bound, and it is their duty to repair the houses, in accordance with the covenants in the leases, out of the *corpus* of the estate. There is no rule of law that the tenant for life is bound to do these repairs out of the rents and profits. She is to enjoy these leaseholds in specie, but she is under no covenants to repair, and there is nothing in the will to show that the testator intended her only to have the net rents, after making provisions for the liabilities that arose in the testator's lifetime. It cannot be fairly left to the widow to make good the deficiencies of the testator. The appellants relied on *In re Fowler* (1). But that was a very different case, and the question which arose there does not arise here. Here it is not a question whether the trustees are bound to keep up the houses, but whether the tenant for life is bound. In that case the question was whether trustees ought, out of rents and profits in their hands, to provide for the repairs, and Lord Justice Fry decided that, as under the terms of the will they were to receive the rents, and to preserve the property for the remaindermen, it was their duty to apply the rents in their hands towards the repairs. No question was decided there between the tenant for life and the remaindermen, only that the trustees, having the property in their hands, and having the duty to receive the rents and profits, had also the duty to keep that part of the estate in repair, and, having nothing but rents and profits in their hands, they must apply them for this purpose. If it had been a decision between tenant for life and remaindermen, I should have had some difficulty in following it. But I consider it is no authority in the present case." And Bowen, L. J., says:—"I am of the same opinion. The first question on this appeal is whether the tenant for life is bound to keep the leaseholds in such a state of repair as to prevent forfeiture. These houses are given to the widow during her life. What obligation is there on her? Is she to take on herself the entire burden and repair them out of her own money, or only expend the income which she derives from the rents and profits of the property? Whichever way the point is put, the obligation is quite imaginary; it can arise nowhere unless it is to be found in the will. It is admitted that it is not to be found

(1) 16 Ch. D. 723.

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in the will, therefore it does not exist. The Lord Justice Cotton has explained the distinction between this case and *In re Fowler* (1) and I agree with him. That case did not decide the rights, as between the tenant for life and the remaindermen." To the same effect are the observations of Fry, L. J.

In *Re Fowler; Fowler* v. *O'Dell* (1) there was no other fund for repairs *except* the rents (see judgment, p. 725), and the case is perhaps capable of being explained on that ground. But the case must be considered as at least of very doubtful authority (*Re Courtier* (2)), and one which affords no guidance, when the very peculiar circumstance alluded to does not exist.

I think it therefore plain, upon the authorities, that as between tenant for life of a leasehold, specifically bequeathed, and the general assets of the testator, there is no equity in favour of the latter to throw on the former the obligation of putting the leaseholds, which were dilapidated at the time of his death, in repair, and that *Harris* v. *Poyner* (3) is an authority that the repairs ought to be defrayed out of the general estate.

But Serjeant Campion contended that if this be so, or at least if the entire cost cannot be thrown upon the tenant for life, the equitable doctrine of this Court which generally distributes the burden between tenant for life and remainderman in proportion to their respective interests, calls for some adjustment of the payment in this case: and he suggested that if the trustees are called upon to pay the cost of putting in repair, interest upon the amount so expended ought to be charged against the tenant for life, during her enjoyment of the leasehold estate. And there is much good sense and apparent justice in this contention. In support of it, he relied on passages found in the judgments in *Freke* v. *Calmady; Re Hotchkys* (4).

In that case the facts were dissimilar to those before me. There was a devise to trustees of "all my freehold, leasehold, and copyhold lands and hereditaments, and all my real and personal estate, of what nature or kind soever, and wherever situate," unto and to the use of Vincent Calmady, and two other persons therein named, their heirs, executors, administrators, and

(1) 16 Ch. D. 723.
(2) 34 Ch. D. 136.
(3) 1 Dr. 174.
(4) 32 Ch. D. 408.

assigns, "upon trust at their discretion to sell and dispose of all such parts thereof as shall not consist of money, and out of the produce of such sale shall first pay all my just debts and my funeral and testamentary expenses, and shall then invest the residue of such moneys in, etc., and shall stand possessed of such real and personal estate, money, and securities upon trust to pay the rents, interest, and dividends, and annual produce thereof unto my dear friend Emily Tuson for and during the term of her natural life as and for her separate estate, and so that the same shall not be subject to the debts or control of any husband of hers, and that her receipts alone be a sufficient discharge for the same, and I direct that if the said Emily Tuson shall alien or dispose of the same, or charge the same or any part thereof by anticipation, whether by her own act or by act of the law, the same shall be thenceforth forfeited to the use of the said Vincent Calmady, his heirs, executors, administrators, or assigns." Then after providing that the trustees might effect the sales of all or any part of her estate, either by public auction or private contract, and empowering them to give receipts to purchasers, she proceeded:—"And from and after the decease of the said Emily Tuson, I give, devise, and bequeath my said real and personal estate, and the securities on which the same may be invested, unto and to the use of the said Vincent Calmady, his heirs, executors, administrators, and assigns for ever, according to the nature and quality thereof respectively." Pancraswick estate was held in fee, in possession, unincumbered. Blatchborough estate was a reversion (subject to heavy mortgages), and was also held in fee. The reversion fell in six years after the death of the testatrix. Besides being incumbered, the Blatchborough estate was in need of repairs, which ought to be effected in course of proper management. But the estate was one in fee simple, and not a leasehold. No obligation whatever attached to the testatrix to repair or put in repair. No such liability attached to the estate of the testatrix in any shape. So far as repairs were concerned, it was only a question of prudent management, the determination of which rested with the trustees, whether in the interests of all parties the repairs ought to be effected, and if so, how they should be borne—whether out of the income of the tenant for life or out of the *corpus* of the property.

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It is in reference to that question that Cotton, L. J., says (page 416): "What then, in that state of facts, is the right as between the tenant for life and the remainderman? The estate was to be vested in the trustees during the tenancy for life. In my opinion, in a case where trustees have property vested in them under circumstances like these, there is an obligation upon them, for the purpose of properly carrying out and performing their trust with regard to the property, to see that the property does not fall into decay from want of proper repair. But when the property has fallen into bad repair, the question will of course arise whether it is worth while to do the repairs. It may be that where there is a devise of two estates, one subject to an incumbrance not made by the testator, and the other not incumbered, it may not be worth while to expend any money out of the unincumbered estate for the repairs of the incumbered one, for it would be throwing away money to repair the property if the circumstances were such that no one but the incumbrancer would be benefited by the expenditure. Then of course the trustees would be wrong in applying anything not in mortgage to repair a property which, when repaired, would not be worth anything to the estate. No doubt, if it was clearly for the benefit of the whole residue to repair the mortgaged property, the Court would say that the trustees must do it, and that the money must be raised in such a way as not to throw the burthen unfairly either upon the tenant for life or upon the remainderman"; and again, "according to my view, the burthen of repairing, if it is necessary and proper, ought to be thrown upon the estate in such a way as not to throw it entirely upon the tenant for life or upon the remainderman."

And it is in reference to the same question that the observations of Lindley, L.J., are directed. He says:—"As regards the substantial question, that of the repairs, it appears to me there is no avoiding the application to this case of the rule laid down by Lord Hatherley in *Powys* v. *Blagrave* (1). The tenant for life is equitable tenant for life, and the remainderman is not entitled to throw upon her the burthen of keeping the property in repair. I think that is perfectly plain. Whether the property is to be

(1) Kay, 495.

regarded as one property or as two appears to my mind to be for this purpose immaterial. The remainderman cannot be entitled to throw upon the tenant for life the burthen of the repairs by paying for them out of the rents. I quite agree with what Lord Justice Cotton has said that if it is shown that it is judicious to make repairs, and the trustees come to the Court for authority to make them, that authority will be given, but it will be given on equitable terms as to the mode of paying expenses. If such an application is made it will have to be considered whether the repairs are beneficial, and whether they ought to be made, and if so, how they ought to be paid for. It is unnecessary now to consider the question how the trustees would be authorised to raise the money, whether by sale or mortgage, or in some other way, but it must be done in a mode which is equitable as between the tenant for life and the remainderman, and not so as to throw the whole burthen upon either." The other questions in that case, viz.:—the incidence of the interest on the mortgages on the Blatchborough estate in reference to the rents of the Pancraswick estate, and the claim of the tenant for life to repudiate the devise of the former while accepting that of the latter, do not arise here at all. As regards the repairs, however, I should willingly do what was suggested there and urged by Serjeant Campion if I had any authority for it. But in my opinion there is none. *Re Hotchkys* (1) has no application. Here there is a liability to the landlord for repairs—a liability for which the trustees and executors are liable and primarily liable. The liability was a debt of the testatrix. If the repairs be not made, the interest in the lease will be forfeited and may be evicted. Miss O'Grady is to have the house in Merrion-square as a place of personal residence, subject to her paying the rent and other outgoings. This she cannot do unless the testatrix's covenant is satisfied so as to avoid the forfeiture. She is under no legal or equitable obligation whatever to put in repair (*Powys* v. *Blagrave*) (2). In cases where it is sought to apply the maxim "*qui sentit commodum idem sentire debet et onus*" there is always a preliminary question, what is the *commodum?* and the case I have quoted shows that in this case the *com-*

(1) 32 Ch. D. 408. (2) 4 D. M. & G. 448.

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modum was meant to be the house in that state in which the testatrix was as between herself and the head landlord legally bound to leave it. If so, the legatee does not receive the *commodum* till the repairs are effected, and the *onus* which attaches to it is that which is expressed, namely, the payment of the rent and other outgoings, including (no doubt) the maintenance of the place in tenantable order when once repaired.

In *Re Baring: Jeune* v. *Baring* (1) Kekewich, J., followed *Re Courtier* (2) so far as was necessary for the case before him: but there was not there any question of putting in repair as distinguished from keeping in repair. There is no indication that there had been any breach of covenant in the lifetime of the testator or afterwards. The case has therefore no bearing on the question here.

For these reasons I am of opinion that the cost of necessary repairs must be borne by the trustees out of the general residuary estate.

Solicitor for the plaintiffs: *H. F. Martley.*

Solicitors for the defendants: *F. Sutton & Sons.*

R. W. L.

SIMPSON, DECEASED.

SIMPSON *v.* SIMPSON.

V.-C. 1895.

July 24, 30.

Administration—Retainer.

The widow of an intestate, being the administratrix of his estate, which was insolvent, claimed to be entitled, out of moneys lodged in Court by her, to a right of retainer in respect of a loan she had made to her husband, and which was found to be due to her by the chief clerk's certificate.

Held, that she was entitled to retain, notwithstanding the provisions of the Judicature Act, 1877, sect. 10, and the Married Women's Property Act, 1882, sect. 3. *Crawford* v. *May* (45 Ch. Div. 499) followed.

A personal representative should return a debt due by the deceased to him, and have its existence and amount certified by the chief clerk. It is on the hearing on further consideration that the right of retainer is usually claimed.

(1) [1893] 1 Ch. 61. (2) 34 Ch. D. 136.

V.-C. 1895.

In re SIMPSON.

FURTHER CONSIDERATION. The widow and administratrix of the deceased was returned in the chief clerk's certificate as a creditor in respect of a loan made by her to her deceased husband, whose estate was insolvent. She had lodged money in Court in respect of asssets which had come to her hands as administratrix, and claimed to be entitled to have the amount due to her retained as against his unsecured creditors. Mary Simpson, one of the next-of-kin of the deceased, and a devisee of his heir-at-law, who had since died, was found by the certificate to be an unsecured creditor of the deceased.

Price, Q.C., and *Blood*, for the administratrix :—

The Judicature Act, 1877, does not interfere with the executor's right of retainer : *Lee* v. *Nuttall* (1). It has been decided that a married woman is entitled to retain out of assets come to her hands as administratrix the amount of a loan made to him by her under section 3 of the Married Women's Property Act of 1882 (45 & 46 Vict., c. 75) ; *Crawford* v. *May* (2) ; *Re Leng* (3).

F. Fleming, for Mary Simpson :—

The widow claimed only as an ordinary creditor, and as such her claim has been allowed by the chief clerk. Having elected to come in as an ordinary creditor it is now too late for her to assert a right of retainer.

July 30.

THE VICE-CHANCELLOR :—

The case of of *Lee* v. *Nuttall* (1) decided that the Judicature Act did not interfere with the right of an executor or administrator to retain his debt. This decision was followed by North, J., in *Crawford* v. *May* (2), and held to be an authority not confined to cases of secured and unsecured creditors, but establishing that the section of the Judicature Act did not apply at all to retainer.

The 3rd section of the Married Women's Property Act was also the subject of consideration in that case, and it was held

(1) 12 Ch D. 61. (2) 45 Ch. D. 499. (3) [1895] 1 Ch. p. 652.

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In re SIMPSON.

that a loan by a married woman to her husband within that section was not thereby postponed to the claims of other creditors of the husband, so far as regarded the right of the widow, who was administratrix of her husband, to retain her debt in the administration of his assets, which were insufficient for payment of his debts. It may be considered as settled that neither the Judicature Act nor the Married Women's Property Act, now both combined, have made any change in the common law right of retainer. This was recognised in the recent case of *Re Leng* (1), where it was held that the right of a married woman in her administration of an insolvent estate to claim a debt due to her, for a loan to her husband, but not by way of retainer, was postponed to the debts of his other creditors. In that case the right of retainer was expressly admitted, and the cases of *Lee* v. *Nuttall* (2), and *Crawford* v. *May* (3) approved of. The distinction is between a claim to be paid in ordinary course out of the assets, and the right to retain, which is entirely independent of any act of the Court.

It was contended that as the debt of the administratrix was returned in the chief clerk's certificate of debts on the claim sheet brought in at Chambers, she thereby waived her right of retainer, and elected to come in as an ordinary creditor. I do not think so, for it is the settled rule that the bringing the fund into Court by a personal representative out of which he might have retained his debt does not prevent his right to retain. This is even stronger than what has been done here. It is on the hearing on further consideration on the chief clerk's certificate that the right of retainer is usually claimed. The usual judgment for administration directs as of course an account of all debts due by the deceased at his death, and the personal representative is, I think, bound to return his own debt among them, and thus to have its existence and amount certified. Then at the further hearing a direction is given for allowing the retainer by the personal representative out of assets in hands, or payment out of the fund in Court brought in by him, and his debt is directed to be excluded from the payments to the general creditors.

(1) [1895] 1 Ch. 652. (2) 12 Ch. D. 61. (3) 45 Ch. D. 499.

I therefore hold that here the administratrix is entitled to retain or be repaid the amount of her certified debt in full, and in priority to the other creditors of equal degree.

V.-C. 1895.

In re SIMPSON.

Solicitors for the plaintiff: *Findlater & Co.*
Solicitor for Mary Simpson: *W. W. Carruthers.*

T. H. M.

IN RE LOUGH NEAGH SHIP COMPANY; *Ex parte* WORKMAN.

M. R. 1894.

Dec. 14, 15. 1895. Jan. 30.

Company—Subrogation—Implied power of borrowing—Question of borrowing ultra vires—Equity of lender to be subrogated to rights of creditors paid out of money borrowed—Interest on loan.

A Company formed to purchase and work the ship "Lough Neagh," when the ship was ready for delivery, requested J. W. (who was one of the directors of the Company), to advance to them the sum of £7500, which was owing to the builders in respect of the price of the ship in order to have it released and to obtain possession of the same. J. W. agreed to lend the money, to be repaid with interest at 7 per cent. The money was *bonâ fide* advanced by the firm of J. & R. W., merchants (of which firm J. W. was a member), and was paid to the shipbuilders by the Company. The ship was in consequence released and became the property of the Company. The Company had not at the time any means (without borrowing) available and sufficient for the payment to the shipbuilders, and but for the loan the Company would not have obtained delivery of the vessel. There was no express power, authorizing the borrowing of money for the purpose of paying for the ship itself, or of providing capital for the undertaking, contained in the memorandum of association of the Company. The Company was being wound up under an order of the Court, and J. & R. W. claimed the amount of their loan and interest at 7 per cent. per annum:—

Held, that J. & R. W. were entitled to be subrogated into the position of creditors of the Company in respect of the loan of £7500:—

Held also, that as there was nothing before the Court to show that the shipbuilders were specifically entitled to interest in respect of the debt due to them, and as the claimants were simply placed in their position as regards the £7500, they were not entitled to interest on the loan at 7 per cent. or any other agreed rate, but that they should be allowed interest on the loan at the Court rate of 4 per cent.

M. R. 1894.

In re Lough Neagh Ship Company; *Ex parte* Workman.

Appeal from a ruling of the chief clerk disallowing certain claims by J. & R. Workman, merchants, against the "Lough Neagh" Ship Company, which was being wound up under an order of the Court.

The circumstances and facts of the case, so far as they are material for the purposes of this report, are stated in the judgment of the Master of the Rolls.

Gordon, Q.C., and *J. H. Moore*, for the claimants, J. & R. Workman.

Meredith, Q.C., and *Jefferson*, for the Liquidator of the Company.

The following authorities were referred to:—*Australian Auxiliary Steam Clipper Company* v. *Mounsey* (1); *Bryon* v. *Metropolitan Saloon Omnibus Company* (2); *Blackburn Benefit Building Society* v. *Cunliffe, Brooks & Co.* (3); *Baroness Wenlock* v. *The River Dee Company* (4); *Small* v. *Smith* (5); *In re Patent File Company* (6); *Laing* v. *Reid* (7); *Ex parte Pitman and Edwards* (8); *Campbell's Case* (9); *General Auction Estate Company* v. *Smith* (10); *In re Cork and Youghal Railway Company* (11); *Gibbs and West's Case* (12); *Bluck* v. *Mallalue* (13); *Re the Cardiff, etc., Company* (14); Buckley on Companies' Acts, pp. 165, 505.

1895. Jan. 30.

The Master of the Rolls:—

The Company was incorporated in January, 1891, for the objects stated in the memorandum of association, which were as follows:—

(*a*) To purchase the steel barque "Lough Neagh;" to own and work same.

(*b*) To purchase or otherwise acquire, charter, or otherwise hire, equip, load on commission, sell, repair, let out to hire, and trade with the said vessel.

(1) 4 K. & J. 733.
(2) 3 De G. & J. 123.
(3) 22 Ch. Div. 61.
(4) 19 Q. B. Div. 155; 10 App. Cas. 354.
(5) 10 App. Cas. 119.
(6) L. R. 6 Ch. 83.
(7) L. R. 5 Ch. 4.
(8) 12 Ch. Div. 707.
(9) 4 Ch. Div. 470.
(10) [1891] 3 Ch. 432.
(11) L. R. 4 Ch. 748.
(12) L. R. 10 Eq. 312.
(13) 5 Jur. (N. S.) 1018.
(14) 7 L. T. (N. S.) 656.

(*c*) To carry on the business of shipowners in all its branches, and any other business connected with the said vessel, or which may for the time being be expedient to be carried on therewith.

(*d*) To purchase or otherwise acquire shares in this Company, and to dispose of the same by sale or otherwise, or to extinguish or re-issue same.

(*e*) To employ as ship's husbands, managers, and general agents of and for the said ship, any person, firm, or company.

(*f*) To sell, improve, alter, manage, or dispose of the said ship, her tackle, stores, and appurtenances.

(*g*) To insure the whole or any part of the said ship, her freight, cargo, or other property, on behalf of this Company.

(*h*) To mortgage or charge the said ship or other property of the Company to secure payment of any moneys due from the Company for repairs, insurance, payment of salvage claims, or of obtaining discharge of the said ship from arrest; and expenses incurred in earning freights or prosecuting voyages; and all liabilities or expenses properly incurred by the managers or ship's husband on account of the said ship; and all debts and liabilities of the Company whatever; and all moneys advanced to pay or discharge moneys or claims so due or incurred as aforesaid; or any debts or liabilities of the Company.

(*i*) To do all such other things as are incidental or conducive to the attainment of the above objects.

The capital was to be £12,000 in 1200 shares of £10 each, which were to be—and I presume were so far as issued—fully paid up on allotment. How many shares were actually allotted I am not at present exactly aware; but it appears that there was difficulty in getting in the money promised by the public, and when the vessel was ready for delivery there was still due to the builders £7500 or so of the contract price of £11,350. The remaining £3850 would appear to have been paid under the contract.

Mr. John Workman was a director of the Company, and a member of the firm of J. & R. Workman, merchants; but so far as appears neither he nor J. & R. Workman were connected in any way with the firm of Workman & Clarke, the shipbuilders who built the "Lough Neagh."

In these circumstances Messrs. M'Williams, Smyth & Co., who were the agents for the ship, and entrusted by the Company with its management, applied to Mr. Workman for assistance in order to enable them to release the ship, on which Workman & Clarke had, of course, a lien for their unpaid purchase-money.

M. R. 1895.

In re Lough Neagh Ship Company; *Ex parte* Workman.

This he agreed to render upon terms which are incorporated and set out in a few letters, which I shall now read. On the 24th November, 1891, M'Williams, Smyth & Co., write:—

"Dear Sir,—This vessel is now about finished, and will be ready to leave here to-morrow morning for Newport, from whence she has been chartered by Harrower and Workman for Freemantle, W. Australia.

"We had promised to give Messrs. Workman, Clarke & Co. a further payment on account of the vessel, and shall be glad if you can see your way to let us have a cheque for the £500 you promised to invest in the Company.

"We are now making a vigorous effort to collect all the promised money, as it is now required, seeing that the vessel is ready for sea. You can make the cheque payable either to 'Lough Neagh' Ship Company, limited, or to the builders direct."

Then came the letter of the 3rd December:—

"Dear Sir,—This vessel is now at Newport, loading, and as Messrs. Workman, Clarke & Co. are anxious for settlement, would esteem your assistance in the matter as we have not yet received one-half of the share money that has been promised to us.

"The contract price for the vessel is £11,575.

"To release the vessel in the meantime we will require £7500 to £8000, and shall be pleased to have your assistance in the matter. The greater part of this will only be for a very short time, and, if agreeable to you, would give you acceptance, ¼ at 3 months, which we would take up at maturity, ¼ at 6 months, which we would also take up, and perhaps pay off another £1000. Then the balance in about eighteen months. The 3 and 6 months' bills we would be certain to take up. You would, of course, hold 64/69 of the vessel until the whole amount has been paid off; and as this vessel, carrying about 1700 tons, is fair security for the amount, and the greater part of it for a short date, we trust you may meet us in this matter."

On the 5th December Messrs. J. & R. Workman wrote the following letter:—

"We agree to lend you £7500 on the following terms: 'That the vessel be be made over to us. That she be kept fully insured, with collision and all other clauses included necessary to keep us secured; the policies to be indorsed in our name, and handed to us. You to accept bills for the amount of loan renewable every three months, £2000 to be paid off in 3 months, £2000 to be paid off in six months, and the remainder to be all paid off inside eighteen months. The bills to be accepted payable in London, we to pay the commission for London money. The interest, at the rate of 7 per cent. per annum, to be paid every three months, at time of renewals.'"

On the 7th December the following letter was received from the Lough Neagh Ship Company, signed by M'Williams, Smyth & Company, managers:—

"We are in receipt of your favour of 5th inst., agreeing to lend us £7500 on the following terms" [which are then set out]:—"That the vessel be made over to you. That she be kept fully insured, with collision and all other clauses included necessary to keep you secured, the policies to be indorsed in your name, and handed to you. We to accept bills for the amount of loan renewable every three months, £2000 to be paid off in three months, £2000 to be paid off in six months, and the remainder to be paid off inside eighteen months. The bills to be accepted payable in London, you paying commission for London money, we to pay bill stamps. Interest at the rate of 7 per cent. to be paid every three months, at time of renewals. This arrangement we now beg to confirm, and will have everything in order on Thursday next."

This must be treated as being done by the directors as a body, and binding to the same extent as if the correspondence had been with the Board directly.

It appears that although this advance of £7500 was made by John Workman and by his own cheque, it was as between himself and his partners the money of J. and R. Workman. I mention this only to dismiss the matter. It is of no consequence as regards the Company; and if any amendment of the claim in matter of form had been necessary it would of course have been made. The claim is by J. and R. Workman; and though some small point was raised on this before the chief clerk it was properly given up before me.

The loan by Workman (for I shall so call it) was, in terms of the agreement contained in the letters I have read, covered by a mortgage of the ship. This mortgage, however, turned out to have been a forgery so far as the signature of one of the directors was concerned. Of course Mr. Workman was not aware of the fact of the forgery, nor in any way responsible for it. Whether if regularly executed it would or would not have bound the Company, Mr. Workman cannot and does not rely on it now; and the claim brought in is simply as an unsecured creditor for the amount of the advance and the stipulated interest of 7 per cent.

I find as matters of fact that the £7500 was all *bonâ fide*

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advanced by the claimants for the purpose of enabling the Company to obtain possession of the ship: that no improper motive, nor any desire to make money out of the Company, was in the mind of Mr. Workman: that the stipulated rate of interest (7 per cent.) was neither unusual nor excessive; that the whole of the £7500 was in fact paid over to Workman and Clarke by claimant's cheques, handed to the latter by the managers of the Company; that the ship was in consequence liberated and became the property of the Company; that without payment Workman and Clarke would not have parted with the ship; that the Company had not at the time any means (without borrowing) available for and sufficient to pay the builders; and that but for the payment in question the Company would not have obtained delivery of the vessel, and would have lost the whole or a very large part of the money previously expended on her, and would have been then compelled to liquidate.

J. and R. Workman then claim as creditors to be paid their advances and interest. This is resisted by the liquidator, on the ground that the transaction of the loan was *ultra vires*, and does not bind the Company. Obviously the fact of the Company having gone into liquidation does not affect the question. The law must be the same as it would have been had the Company been solvent or even prosperous; for the question of *ultra vires* does not depend upon the result, but upon the transaction itself.

The fact of the advance is of course not disputed. But the argument is that the Company had no power to borrow money, or at least no power to borrow part of the purchase money of this steamer; and that the transaction is simply void, the Company retaining the ship. Mr. Buckley, in his book on the Companies' Acts, says, at page 166: "If money be borrowed by a Company which cannot borrow (as a Building Society without a borrowing power) there is no debt, and if subsequently the Society acquires power to borrow, and then issues deposit notes for the money previously borrowed, the notes are not binding on the Society for as before there is no debt."

That this result would be a startling injustice cannot determine the question, particularly when the lender is himself a director. I put the case during the argument thus:—Supposing the whole

of the price excepting a small sum had been paid by the Company, say £11,000 out of the £11,350; and Mr. Workman had advanced the balance in order to enable the Company to get delivery, would he lose it in any and every event? The answer, however, would seem to be that the degree or amount can make no difference, if the loan was *ultra vires*. That is the question.

In my opinion there is no express power to borrow which covers this case. [His Lordship read clause (*h*) of the Memorandum of Association.] This power, though large, does not seem to me to have been meant to apply to the case of a loan contracted, not to enable the Company to work the ship to advantage when paid for, but to pay for the ship itself; in other words it does not meet the case of an attempt to raise the capital of the Company by loan in advance of the issue of its shares. And this circumstance, namely, the fact that the advance was really an advance of capital not in existence seems to me to distinguish the case from all those in which, in the case of trading companies, power to borrow, without or in excess of *express* powers, have been held to exist as in *The Australian Auxiliary Steam Clipper Company* v. *Mounsey* (1); *General Auction Estate Company* v. *Smith* (2). If the case turned upon the validity of the transaction as a loan, I should have great difficulty in upholding the claim.

Borrowing for the purpose of carrying on a partnership trade or business is one thing. Borrowing for the purpose of providing the capital which ought to be provided by the issuing of shares is another. The former operation is, unless expressly prohibited, clearly legal. [See the observations of Stirling, J., in *General Auction Estate and Monetary Company* v. *Smith* (2).] But the latter is at least very questionable on the ground I have mentioned, even admitting that the present is a trading Company and subject to the rules applicable to such bodies.

I do not however think it necessary on the point now under discussion to decide this question, because upon another ground I think the claimants are entitled to succeed, namely, upon the ground of what is now usually called subrogation (a word taken from the civil law) formerly more generally termed substitution.

(1) 4 K. & J. 733. (2) [1891] 3 Ch. 432.

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The civil law on the subject is stated in the Digest, "Plane cum tertius creditor primum de sua pecunia dimisit, in locum ejus substituitur in ea quantitate quam superiori exsolvit." It is true the present is not the case of several creditors. But it is the case of a person interested in the affairs of the Company, discharging, with the privity and consent of the Company, a liability of the latter by payment. This has the effect of placing the person making the payment in the position in which the creditor stood before he was paid off: and as the ship was finished and ready to be delivered up, Workman and Clarke were under their contract entitled to be paid and could have sued for the price, averring readiness to deliver, or could have maintained an action for not accepting and paying for the ship according to contract. In either case they could have sustained a petition for winding up, and come in as creditors. Or, if they had given up the vessel without being paid, they could of course have taken the same course or courses.

Now, by paying Workman and Clarke, the claimants became equitable assignees of their rights, including the right to sue the Company; and on that ground are, in my opinion, entitled to sustain the present claim. There has been in the result no real borrowing by the Company at all. If a liability has been created towards J. and R. Workman an exactly equal liability to Workman and Clarke has disappeared. It is simply a change of creditor, not a new debt. Lord Selborne, delivering judgment for Sir G. Jessel and Cotton, L.J., as well as himself, says in *The Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1), "The general principles applicable to a case of this description are, we think, sufficiently well settled. There can be no doubt that where there is an express prohibition against borrowing, it must be obeyed. There is also no doubt, that where there is not an express prohibition against borrowing in a case of a Company or a society constituted for special purposes, no borrowing can be permitted without express authority, unless it be properly incident to the course and conduct of the business for its proper purposes. Now, in this case there is no borrowing power, nor can it be said that a borrowing

(1) 22 Ch. Div. 61.

power generally can be necessary for the purpose of the business of this society; therefore it is not upon the footing of an incidental or expressed power to borrow, that anything can be allowed in this case. When the documents are looked at in which the agreements between this society and their bankers, the appellants, are embodied, it is perfectly apparent, that a course of dealing was contemplated and agreed upon between the bankers and the society, which was not authorized by the rules of the society; and, consequently, that any benefit of the securities which were in the hands of the bankers at the time of the winding-up, to which they may be legitimately entitled, is not founded upon those agreements, or upon that course of dealing; that, so far as it depends upon the agreements and the course of dealing which was regulated by the agreements, the bankers are wrong, and the burden of showing that they are entitled to anything lies upon them and not upon the other side. But there is an equitable principle consistent with the law of which I have spoken, sound in itself, and also sufficiently established by authority, which may entitle them, nevertheless, to some benefit from their securities; and if the facts of the case give them the benefit of that equitable principle, it is consistent with justice and authority to say that irregularity of either the form or the substance of their course of dealing shall not stand in the way of the justice due to them. That was established, to mention one authority only, in the case of *In re Cork and Youghal Railway Company* (1), before this Court of Appeal, where it was held, in respect to that class of securities which were called *Lloyd's* bonds, that although they could in themselves constitute no indebtedness as against the Company issuing them, yet, nevertheless, they might be so far evidence of a contract between the Company and the persons holding them, sufficient to entitle the holders to that security or right of repayment which the Company might lawfully have given them under the actual circumstances of the case if that form had not been adopted. And I think the consistency of the equity allowed in *The Cork and Youghal Railway Company's Case* (1) with the general rule of law that persons who have no borrowing powers cannot, by bor-

(1) L. R. 4 Ch. 748.

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rowing, contract debts to the lenders, may be shown in this way. The test is:—Has the transaction really added to the liabilities of the Company? If the amount of the Company's liabilities remains in substance unchanged, but there is, merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the Company. Regarded in that light it is consistent with the general principle of equity that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity; and if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the Company, there has been no real transgression of the principles on which they are prohibited from borrowing."

It was contended, however, that cases of that sort did not apply, because here there was no actual debt due to the shipbuilders at the time of the advance by Workman. I do not so read the affidavits nor the prospectus of the Company. I think, as I have already said, that it must be taken that the Company owed the money, the balance of the price of the ship. There is no suggestion that Workman and Clarke were only to be paid if and when the money to pay them was raised by placing shares. Even if this were not so, however, what is to be said when the ship was actually delivered free from lien by means of the £7500 lent by claimants? It would make no difference whatever if the debt had not matured, or even had not been contracted, at the date of the loan.

The case of *The Baroness Wenlock* v. *The River Dee Co.* (1), in the Court of Appeal and in its previous stages, is an express authority for this proposition. There had been a previous trial in the action brought by the plaintiffs, as executors of Lord Wenlock, claiming that they might be declared entitled to recover from the defendants the amount of moneys advanced by the testator to them, which

(1) 19 Q. B. D. 155.

had been applied to the payment of debts or liabilities of the Company existing at the time of the respective advances, and also such further sum as could be shown to have been applied in payment of debts and liabilities which arose subsequent to the respective advances on the principle of subrogation. The matter came before the Court of Appeal in England, principally on the question as regards the considerable portion of the advances which it was said had gone to pay debts of the Company which were not due at the time the advances took place. The facts are stated at page 156 of the report. The testator had advanced large sums to the defendant Company. He had also paid off a previous advance of £56,000 from the Rock Insurance Company to the defendants, taking an assignment of that debt and a fresh covenant for repayment to himself by the defendants. The Judge at the trial gave judgment for the plaintiffs for the full amount of the advances by the testator to the defendants. Upon appeal, the Court of Appeal varied this judgment, and, by order dated 9th May, 1883, ordered that judgment should be entered for the plaintiffs for the amount of £25,000 (that sum being the full amount which the Company had power to borrow), and interest, and also in addition thereto that the plaintiffs should recover judgment for so much and so much only, of the sums advanced as were employed in payment of any debts or liabilities of the Company properly payable by them, and interest from the respective dates of such employment, and that it should be referred to a special referee to inquire as to and report the amount of the interest payable on the said sum of £25,000, as aforesaid, and the amount of the parts of the said sums so employed as aforesaid, and the interest thereon. The plaintiffs applied to the Court of Appeal to decide certain questions of law raised by the report of the referee, and to vary the report in certain respects, and there was a cross-application to vary by the defendants. Fry., L. J., in giving judgment, after stating what was directed by the order of the 9th May, 1883, says: "It appears that some of the moneys were applied in payment of debts and liabilities properly payable by the Company at the date of the advances, and some in payment of debts and liabilities which arose or became properly payable at dates subsequent to

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the advances. The defendants contend that only the advances employed in payment of debts and liabilities actually payable at the date of the advance can be brought within the operation of the order." He then states plaintiffs' contention and says it ought to prevail, and that the order bears the wider construction. "It is silent," he says, "as to any limit of time within which the liabilities are to accrue, or within which they are to be paid, and by fixing the respective dates of the employment of the sums as the periods of time from which interest is to run, it seems to indicate that the date of the employment, and not of the advance, is the material one. If the Court had intended any such limitation of the inquiry as that now contended for by the defendants, we think that it would have found expression, if not in the formal order, at any rate in the oral judgments, but we can find no trace of it."

"But," he says, "we go farther, and say that in our judgment the equity in question knows of no such limitation as that suggested. This equity is based on a fiction, which, like all legal fictions, has been invented with a view to the furtherance of justice. The Court closes its eyes to the true facts of the case, viz., an advance as a loan by the quasi-lender to the Company, and a payment by the Company to its creditors as out of its own moneys, and assumes, on the contrary, that the quasi-lender and the creditor met together, and that the former advanced to the latter the amount of his claim against the Company, and took an assignment of that claim for his own benefit. There is no reason that we can find for supposing that this imaginary transaction between the quasi-lender and the creditor was confined to the day and hour of the advance of the money to the Company. In the coffers of the Company the money really advanced as a loan is still thought of by the Court as the money of the quasi-lender; and the Court, as the author of the benevolent fiction on which it acts, can fix its own time and place for the enactment of the supposed bargain between the two parties, who have met and contracted together only in the imagination of the Court. The true limit of the doctrine we conceive to be stated by Lord Selborne in delivering the judgment of this Court in the case of the *Blackburn Benefit Building Society* v. *Cunliffe*,

Brooks & Co. (1)," and he refers to the passage that I have already read. He goes on :—" Now the payment of *bonâ fide* liabilities arising or accruing subsequently to the actual date of the advance has in no way really added to the liabilities of the Company, and therefore in no way transgresses the boundaries of the doctrine as laid down by this Court in the case to which we have referred"; and he so decides.

I am therefore of opinion, without any doubt, that the claimant is entitled to the position of a creditor for his advances, and so decide. I am not called upon to express any opinion as to whether he might not be entitled to any other or higher right than that.

A question has been raised as to whether he is entitled to claim any and what interest on his advances. On that point the argument between the claimant and the Company provided for interest at 7 per cent.—a rate proved to be usual and reasonable in the case of advances on mortgage of a ship in course of building. But I am not giving effect to the claim as a contract liability of the Company to J. & R. Workman. The ground on which I decide in favour of the latter on the main question simply places them in the position of Workman & Clarke as regards the £7500. There is nothing before me to show that Workman & Clarke were, by their contract with the Company, specifically entitled to interest. If they were, I think the claimants are equitable assignees of their rights, including interest at the agreed rate. If not, I have no power to give it as incident to the contract. Indeed it may well be that the payment to Workman & Clarke, which, of course stopped any right in them to interest, could confer no right in respect of it upon the claimants. On the materials before me, I am therefore, with regret, obliged to decline to say anything as to interest at 7 per cent. or any other agreed rate. But in the case of *Baroness of Wenlock* v. *River Dee Company* (2), the Court of Appeal gave interest—I presume at the Court rate—on money advanced as this money was, and I I shall follow that case, allowing interest at 4 per cent. If claimants are so advised, they may bring forward a fresh claim

(1) 22 Ch. Div. 61, at p. 71. (2) 19 Q. B. D. 155.

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to interest at any higher rate. I must not be taken, however, as encouraging them to do so.

Of course, if the case goes further, and if it is found that I am wrong in not admitting the claim as a direct debt due to the claimants, it would seem to follow that interest at 7 per cent. should be allowed.

I am averse to making decisions "without prejudice," but in this case I must introduce such words in order to preserve the right to bring in a further claim, because interest in such cases—I mean when it is not conferred by contract or statute—is an incident of the principal; and a decision, amounting to something like a judgment, for the principal alone might *per se* be a bar to a substantive proceeding for the recovery of the former.

The other matters arising on the claims for salvage have been already ruled on. The claimants are entitled to them so far as they consist of wages, etc., paid under the circumstances in proof, and to retain so much of the freight money in their hands as will suffice to pay them, refunding the balance, after deducting the costs of their claim and the proceedings thereunder when taxed. The claim for money paid by the claimants for insurance on the ship I have already disallowed, because I am quite clear that that was paid entirely in relation to their supposed position as mortgagees, and not for the benefit of the ship or its owners. As the mortgage has turned out to be invalid, the insurance premiums voluntarily paid are not in the nature of salvage claims, and so cannot be charged as salvage, or in any other way.

Solicitors for the claimants: *James M'Lean & Son.*
Solicitors for the liquidator: *L'Estrange & Brett.*

R. W. L.

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should be a charge upon the real and chattel real property devised to *S.* The testator died in 1872, and *S.* who was the sole acting executor became possessed of the entire real and personal estate. The personal estate was sufficient to pay the legacies in full, but was misappropriated by *S.*, and certain of the legacies were left unpaid, interest thereon being paid to the legatees who had no notice of the *devastavit*. *S.* mortgaged the lands, and afterwards becoming embarrassed carried an arrangement with his creditors, and obtained a certificate of conformity. The legatees had been returned in the statement of affairs as unsecured creditors, but to this they objected, and had their names struck out, and did not participate in the composition:—*Held*, that although the personal estate was originally sufficient, and the deficiency was caused by the *depastavit* of the executor, the unpaid legacies became charged on the lands. *Held*, also, that there was no laches on the part of the legatees to postpone them to the incumbrances created by *S.*, and that their rights as secured creditors were not affected by the arrangement proceedings. *In re Bradford's Estate* [MONROE, J., 251

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See COVENANT TO SETTLE.

CODICIL—Republication of will by - 346
See REPUBLICATION OF WILL BY CODICIL.

COMPANY—Limited—Bill of sale—Registration—Winding up - - - 368
See BILL OF SALE.

—— Limited—Borrowing powers—Excess of—Subrogation - - - - 533
See SUBROGATION.

—— Unregistered—Winding up - - 1
See WINDING UP.

COMPENSATION — *Error in rental — Tithe rentcharge.*] A rental with respect to six out of seven lots contained specific statements as to whether tithe rentcharge was payable or not; but as to lot 7 no reference to tithe rentcharge was made, although this lot was in fact liable to tithe rentcharge:—*Held*, that the case was not distinguishable from *In re Bailie's Estate* (31 L. R. Ir. 98, 373), and that the purchaser of lot 7 was not entitled to compensation, even assuming that he purchased in ignorance of the existing liability. The purchaser's father, who had undertaken to bid, and afterwards substituted his son, acting as his agent, having had, previously to the sale, actual knowledge of the liability:—*Held*, that the purchaser could not be allowed under the circumstances to claim compensation on the ground of supposed forgetfulness of his agent. Compensation may be given after the completion of the purchase. *In re Somerville's Estate.* GIBSON, J., FOR LAND JUDGE - - - - - 460

COMPROMISE—Testamentary suit—Costs 103
See COSTS.

COMPULSORY PURCHASE—*Railways (Ireland) Acts—Traverse—Interest—Conveyance.*] An owner of lands taken by a Railway Company, under its compulsory powers, executed a conveyance to the Company of his interest in the lands in consideration of payment of £80, being the amount of compensation awarded to him on the hearing of a traverse. No claim for interest was made at the time of the execution of the conveyance:—*Held*, that the execution of the conveyance did not estop the owner from afterwards claiming interest on the amount awarded from the time of entering on the lands down to the date of payment of the amount awarded. *In re Baltimore Extension Railway Co., Limited; Ex parte Daly* - - M. R. 169

COMPULSORY PURCHASE—*continued.*
—— Registration of vendor's title—Costs - 297
See REGISTRATION OF TITLE. 2.
CONDITION IN WILL—*Condition in restraint of marriage—Gift over in the event of a daughter marrying beneath her.*] A gift over of real estate in the event of the devisee marrying a man "beneath her in life, that is to say, below her in social position," is good. Evidence having been taken as to the social position of the devisee and her husband at the time of the marriage, it was held that the gift over took effect. *In re Greene, deceased; Greene* v. *Kirkwood* - M. R. 130; APP. 142
—— Settlement on testator's daughter - 346
See REPUBLICATION OF WILL BY CODICIL.
CONDITIONAL ORDER FOR SALE—Equitable mortgage—Future advances
See PRIORITY. [146
CONDITIONS OF SALE—Time—Objection [288, 296
See REGISTRATION OF TITLE. 1.
CONTEMPT—Appeal—Minor matter—Practice
See APPEAL. [266
CONTRARY INTENTION—Codicil—Republication of will - - - - 346
See REPUBLICATION OF WILL BY CODICIL.
CONVEYANCE — Compulsory purchase — Interest - - - - - 169
See COMPULSORY PURCHASE.
—— Costs of—Compulsory purchase—Registration of vendor's title - - 297
See REGISTRATION OF TITLE. 2.
—— Escrow — Specific performance — Purchase money—Order enforcing payment 508
See SPECIFIC PERFORMANCE.

COSTS—*Executors propounding will—Withdrawal of opposition during progress of case—Secret compact—Principles regulating the allowance of costs in contentious proceedings — Equitable jurisdiction.*] Plaintiffs, as executors, propounded a will and codicil of a deceased. The validity of the codicil was disputed by the defendants on the grounds of informal execution, want of capacity, that the deceased did not know and approve of its contents, and that its execution was procured by the undue influence of *G.* and *O.*, two of the plaintiffs. The residuary legatees did not challenge the validity of the codicil, and were not represented at the hearing. The codicil in question bequeathed legacies of considerable amount to the two plaintiffs *G.* and *O.*, and reduced the amounts of legacies given by the will to the defendants and intervenients, and had the result of reducing the residuary estate. After three witnesses had been examined in support of the plaintiffs' case counsel for defendants withdrew the defendants' pleas, and all charges of undue influence, and all further opposition to the proof of the codicil. Counsel for the plaintiffs then stated that they did not ask for costs against the

COSTS—*continued.*
defendants, but asked to be allowed their costs out of the estate. The Court directed the jury to find in favour of the plaintiffs, and made a decree for probate of the will and codicil; and, being of opinion, on the evidence adduced, that the defendants had no reasonable ground for opposing the codicil, ordered defendants to pay the plaintiffs their costs, refusing to onerate the estate with the payment of such costs. Previous to the withdrawal of the opposition of the defendants to proof of the codicil, a secret arrangement, embodied in a memorandum of consent or compromise, was entered into between the parties. It was signed by the two plaintiffs *G.* and *O.*, and by counsel and solicitors representing the parties. It was not intended to be disclosed to the Court. On the refusal of the Judge to allow the costs of the plaintiffs to be paid out of the assets, and his direction that the defendants should pay plaintiffs' costs, counsel for plaintiffs, in answer to an inquiry by defendants' counsel, stated they would levy the costs against the defendants. Counsel for defendants then stated that that would be a distinct violation of the arrangement between them, and handed up to the Court the memorandum of consent, which was in the following terms:—"*Ormsby* v. *Good*—Pleas of undue influence and others withdrawn. No costs asked for by plaintiffs against defendants. Plaintiffs and their solicitors to pay the defendants £900 on foot of all costs." On motion to vary the minutes of the judgment so far as the same provided that the defendants should pay the costs of the plaintiffs:—*Held* (1), that although the consent was intended to be kept secret, still, on the construction that its effect was to release the defendants from liability to pay costs, their counsel was at liberty to disclose it to the Court, when he was informed that the plaintiffs would levy their costs, as given to them by the order of the Court, against the defendants. (2) That it was not necessary to leave the consent to be interpreted in a subsequent independent proceeding *inter partes;* but that once the consent became known to the Court, it ought not, as between the parties, to make any award of costs contrary to the letter and spirit of the compact. (3) That the necessary effect of the consent, as between the parties to it, was to discharge defendants from any obligation to pay the costs of plaintiffs, and that, even if that were not its strict legal construction, it would be inequitable and contrary to the honour of the transaction to make defendants pay the costs of the plaintiffs. *Held*, also, that as the estate ought not, under the circumstances, to be onerated with the payment of the costs of the plaintiffs, and as they had forfeited their right to be paid same by defendants, such costs, as between party and party, must be borne by plaintiffs themselves. In dealing with costs

COSTS—*continued.*
in cases of compromise of contentious Probate proceedings there are three possible courses which may be adopted:—1. The Court may form its opinion of the reasonableness or unreasonableness of the opposition from the course of the trial and the evidence actually given before the compromise is arrived at. 2. The Court may refuse to make any specific adjudication as to costs. 3. Or, perhaps, in a certain class of case, the Court may itself inquire into the reasonableness of the opposition by calling witnesses or otherwise. *Ormsby* v. *Good* [PROB. 103
—— Action by receiver in name of owner—Implied indemnity - - - 474
See RECEIVER.
—— Compulsory purchase—Registration of vendor's title - - - - - 297
See REGISTRATION OF TITLE. 2.
—— Security for—Plaintiff out of the jurisdiction—Affidavit - - - - 246
See SECURITY FOR COSTS.
—— Solicitors' Remuneration Act, 1881 - 96
See TAXATION OF COSTS.
COUNTER SECURITY—Surety, 182.
See SURETY.
COUNTY COURT — Administration action—Further proceedings in aid of—Carriage of - - - - - 302
See ADMINISTRATION ACTION. 1.
COVENANT—To renew - - - 187
See RENEWABLE LEASEHOLD CONVERSION ACT.
—— To repair—Premises out of repair at death of testatrix - - - - - 518
See TENANT FOR LIFE.
—— To settle after acquired property - 230
See COVENANT TO SETTLE.
COVENANT TO SETTLE—*Marriage settlement—Covenant to settle any further property to which intended wife, or husband, in her right, should thereafter become entitled during the marriage—Application of words of future acquisition to chose in action of wife at date of settlement.*] *A* by will directed his trustees to pay the income of one-fourth of his residuary estate to his granddaughter *B* for life, and after her death to stand possessed of her share for her children, and directed that an annual sum, not exceeding £200, should be allowed for *B's* maintenance. The trustees invested the surplus income during *B's* minority, and on her attaining age paid her the interest on the accumulations, as if they were part of her one-fourth share. *B* afterwards married *C*, and put in settlement property to which she was entitled under her father's will. There was no reference to her grandfather's will save a recital that, pursuant to a power contained in that will, *B* had appointed an annuity to *C* in the event of his surviving her. The settlement provided that in the event of *B*, during the continuance of the marriage, or *C* in her right, thereafter becoming entitled to any further property exceeding £400, either under her father's will or otherwise, the property so acquired should be held on the trusts of the settlement. *C* afterwards died, and the accumulated fund being claimed both by *B* and by the trustees of the settlement, the trustees of the will paid it into Court, under the Trustee Relief Act:—*Held*, that the fund was not bound by the trusts of the settlement, and that *B* was entitled to have it paid out to her. *In re Atkinson's Trusts; Exparte Fitzroy* - - - - M. R. 230
DATE—Of will—Republication by codicil—Effect of - - - - - - 346
See REPUBLICATION OF WILL BY CODICIL.
DEBTOR'S SUMMONS — Adjudication—Unregistered judgment - - 339
See REGISTRATION OF JUDGMENT.
DECLARATION—Intention to change domicil
See DOMICIL. [379, 407
DECLARATION OF TITLE—Determination of easements - - - - 469
See EASEMENT.
DEEDS—Notice to lodge - - - 201
See NOTICE TO LODGE DEEDS.
DEMONSTRATIVE LEGACY—Misdescription of fund - - - - - 80
See MISDESCRIPTION.
DEPOSIT RECEIPT—*Donatio mortis causâ*
See DONATIO MORTIS CAUSÂ. [284
DEVASTAVIT—Executor also devisee—Legacy charged on real estate - - 251
See CHARGE ON REAL ESTATE.
DOMICIL — *Change of domicil of origin — Permanence of residence — Declaration of intention.*] The domicil of origin will be presumed to continue until a new one is acquired. To effect a change for such a purpose there must not only be a change of residence but an intention to abandon the former domicil and acquire another. Long continued residence is strong evidence of intent to change the domicil, but alone and unaccompanied by the intent, will not effect the change. The question is, in all cases, a question of fact to be determined by the particular circumstances of each case. Under the will of her husband *E. C. D.*, the plaintiff was entitled to the income of the residue of his property for her life so long as she continued unmarried. The plaintiff was born in London of English parents in 1835, and went with her parents to America, when she was three years old. In 1858 she married *E. C. D.*, who was born in Dublin of British parents, and who had gone to America in his infancy. At the date of the marriage he was a wine and spirit merchant in New York in partnership with his father. In 1858 the partnership was dissolved,

DOMICIL—*continued.*
and the father in 1859 returned to Dublin, where he took a lease of some property and built some houses. *E. C. D.* returned to Dublin in 1864 with his wife, and lived there till his death in 1871. The plaintiff continued to reside in Dublin with her mother-in-law until the death of the latter in 1881, and for a year afterwards. The plaintiff then travelled for about five years, and had not any fixed abode. In 1887 she went to reside in the house of *M.* in New York, who had married her sister and was a widower, and she resided there for four years until the last of his daughters was married in 1891. *M.* was born in London in 1827 of English parents. In 1852 he went to New York as agent for his father's business, that of a merchant in London; he visited England every year. In 1858 he married a sister of the plaintiff. He purchased a house and some land in Staten Island, near New York, and he afterwards added to it by further purchases; he also bought a fishing in Canada, where he went every year. He refused to become a naturalized citizen of the United States, and he frequently expressed the intention of returning to England as soon as he had made his fortune. His wife died in London in 1884. In 1888 he retired from business, and sold most of his property in America; and on the 24th June, 1891, he married the plaintiff in New York, where a marriage with a deceased wife's sister is lawful. In 1892 he bought a property in the county of Surrey:—*Held* (affirming the decision of Porter, M.R.), that the plaintiff and *M.* were both on the 24th June, 1891, domiciled Americans, and that the marriage was a valid marriage. *Davis* v. *Adair* - - - M.R. 379; App. 407

DONATIO MORTIS CAUSÂ—*Deposit receipt.*] A deposit receipt unendorsed is a good subject-matter of a *donatio mortis causâ*. The principle of *Duffield* v. *Elwes* (1 Bli. N. S. 497) applied. *Porter* v. *Walsh* - - - - V.-C. 284 [App.]

EASEMENT—*Practice, Land Judges' Court—Objection to Final Notice—Landed Estates Court Act, ss.* 51, 54.] A petition having been presented for declaration of title, an objection was filed claiming a public right of way, which was not admitted by the petitioner. The Court being satisfied that there was a substantial question at issue, refused to decide it upon the objection, and the petitioner declining to accept a declaration of title subject to existing rights of way (if any), allowed the petition to stand over in order to enable the petitioner to assert his right by an action of trespass. Observations on the exercise by the Court of the duty of ascertaining easements, &c., under the Landed Estates Court Act. *In re Jameson's Estate* - Madden, J., for Land Judge, 469

EQUITABLE MORTGAGE—Conflicting equities—Priority - - - - 146
See Priority.

—— Further advances—Notice to lodge deeds
See Notice to Lodge Deeds. [201

ESCROW — Specific performance — Defaulting defendant—Conveyance - - 508
See Specific Performance.

ESTATE FOR LIFE—
See Tenant for Life.
Tenant for Life and Remainderman.

ESTATE PUR AUTRE VIE — Executory agreement—Special occupant 44, 63
See Special Occupancy.

EVIDENCE—Change of domicil—Declarations—Permanence of residence - 379
See Domicil.

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See Power. 2.

EXECUTION—*Fieri facias* - - 508
See Specific Performance.

EXECUTION OF POWER—Misrecital 23
See Portions.

—— Will prior in date to deed creating power
See Power. 1. [205

EXECUTOR—Compromise of testamentary suit—Costs - - - - - - 103
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—— Devastavit—Legacy charged on real estate
See Charge on Real Estate. [251

—— Retainer—Insolvent estate—Proof of claim
See Husband and Wife. 2. [530

FAIR RENT—Fee-farm grant—Tithe rentcharge - - - - - - 328
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FALSA DEMONSTRATIO—
See Misdescription.

FEE-FARM GRANT—Middleman - 187
See Renewable Leasehold Conversion Act.

—— Tithe rentcharge—Incidence of — Fair rent
See Tithe Rentcharge. [328

FIERI FACIAS—Specific performance—Payment of purchase-money - 508
See Specific Performance.

FORFEITURE—Condition in restraint of marriage - - - - - 130, 142
See Condition in Will.

FRIENDLY SOCIETY—Winding up - 1
See Winding up.

FUTURE ADVANCES — Mortgage — Service of conditional order for sale - 146
See Priority.

—— Mortgage—Service of notice to lodge deeds
See Notice to Lodge Deeds. [201

HIRING AGREEMENT—*Construction — Property in goods—Bill of Sale.*] The judgment of the Court of Appeal [1894] 1 Ir. R. 240 affirmed. *M'Entire and others, Appellants; Crossley Brothers, Limited, Respondents* H. L. 308

HUSBAND AND WIFE—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 3—*Judicature Act* (*Ireland*) 1877 (40 & 41 Vict. *c.* 57), *s.* 28, *sub-s.* 1—*Administration action—Insolvent estate.*] In an action in which the estate of a testator who had died insolvent was being administered, the testator's widow claimed as a creditor of the estate in respect of a loan made by her to the deceased out of her separate estate during coverture:—*Held* (affirming the decision of the Master of the Rolls), that the claim of the widow in respect of this loan was not postponed to the claims of the other creditors of the estate by the joint operation of the Judicature Act (Ireland), 1877, section 28, sub-sect. 1, and of the Married Women's Property Act, 1882, section 3. *Moore* v. *Smith* [APP. 512

2. —— *Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 3—*Judicature Act* (*Ireland*), 1877 (40 & 41 *Vict. c.* 57) *s.* 28, *sub-s.* 1—*Administration action—Retainer — Claim — Practice.*] The widow of an intestate, being the administratrix of his estate, which was insolvent, claimed to be entitled, out of moneys lodged in Court by her to a right of retainer in respect of a loan she had made to her husband, and which was found to be due to her by the chief clerk's certificate. *Held*, that she was entitled to retain, notwithstanding the provisions of the Judicature Act, 1877, sect. 28, sub-s. 1, and the Married Women's Property Act, 1882, sect. 3. *Crawford* v. *May* (45 Ch. Div. 499) followed. A personal representative should return a debt due by the deceased to him, and have its existence and amount certified by the chief clerk. It is on the hearing on further consideration that the right of retainer is usually claimed. *In re Simpson, deceased; Simpson* v. *Simpson* V.-C. 530

—— Marriage Settlement.
See SETTLEMENT.

—— Will—Construction—Gift to wife to be disposed of as she thinks fit amongst children - - - - - 334
See TRUST.

INDEMNITY—Owner of insolvent estate — Costs of proceedings taken in his name by receiver - - - - - 474
See RECEIVER.

INFANT—Minor matter—Appeal—Appellant in contempt - - - - - 266
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INJUNCTION—Action in Chancery Division—Mode of trial—Transfer—Injunction 504
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INSOLVENCY—Surety—Counter security 182
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INSOLVENT ESTATE — Administration — Debt due to wife - - 512, 530
See HUSBAND AND WIFE. 1, 2.

INTEREST ON MONEY—Compulsory purchase—Conveyance - - 169
See COMPULSORY PURCHASE.

—— Mortgage—Judgment—Merger - 274
See MERGER.

—— Subrogation - - - - - - 533
See SUBROGATION.

INVESTMENT—Money lodged in Land Judges' Court under provisional offer—Duty of solicitor having carriage - - 259
See SOLICITOR.

ISSUE — *Marriage settlement — Construction — "Issue" includes all descendants—Children and grandchildren taking* per capita.] The word "issue" occurring in a marriage settlement *prima facie* includes all descendants, and in the absence of some controlling or explanatory context is not to be restricted to children only. *Dixon's Trusts* (I. R. 4 Eq. 1) and *Denis' Trusts* (I. R. 10 Eq. 81) considered. Observations of Christian, L.J., in *Dixon's Trusts* considered and dissented from. *Hobbs* v. *Tuthill* - - - M.R. 115

JOINT TENANTS — *Settlement — Personalty—Limitation to the use of the husband and intended wife, and the husband's children by former marriage and children of intended marriage—Springing use—Bankruptcy of husband.*] A settlor assigned to trustees tenancies from year to year and personal chattels, to hold upon trust for the settlor until his then intended marriage, and after the solemnization thereof to the use of the settlor, his intended wife, and the children of the settlor by a previous marriage and any issue to be born of the intended marriage:—*Held* (affirming the decision of the Vice-Chancellor), that the husband and wife, with the children of the first and second marriages, took as joint tenants, the class of unborn children to be opened when and as necessary, so as to include new members. *O'Hea* v. *Slattery* - - APP. 7

JOINTURE—*Jointure and portions charged on lands—Postponement of jointure in favour of mortgagee of portion—Intervening portion—Priorities.*] Lands were subject to a jointure, and, as a next charge, to a sum for portions. The second appointee in date of part of the portion-money mortgaged his share, and the jointress postponed her jointure in favour of the mortgagee:—*Held*, that the postponement was to be treated as an equitable assignment, and that the jointress had not thereby postponed her jointure to the first appointee's share. Rights and priorities of the parties considered. *In re Armstrong* - - - - V.-C. 87

JUDGMENT — Mortgage debt — Merger — Interest - - - - - - 274
See MERGER.
—— Registration.
See REGISTRATION OF JUDGMENT.

JUDGMENT MORTGAGE—*Effect of—Equitable charge on land.*] A judgment registered as a mortgage against lands, of which the judgment debtor is seised subject to a mortgage, does not affect a beneficial interest of the judgment debtor in the mortgage. *In re Browne's Estate* (unreported), explained and followed; *In re Blake's Estate; Sloane, Petitioner* - MADDEN, J., FOR [LAND JUDGE, 468

JUDICATURE ACT—S. 28, sub. s. 1 512, 530
See HUSBAND AND WIFE. 1, 2.

JURISDICTION, PROBATE DIVISION—Enforcement of compromise - 103
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JURY—Trial by—Injunction—Practice, Chancery Division - - - - - - 504
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LACHES—Legatee—Charge on real estate 251
See CHARGE ON REAL ESTATE.

LANDLORD AND TENANT—Lease.
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—— Redemption of rent—Fee-farm grant—Fair rent—Tithe rentcharge - - 328
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LEASE—Charge—Apportionment between tenant for life and remainderman - 479
See TENANT FOR LIFE AND REMAINDERMAN.
—— Covenant to repair—Devise—Premises out of repair at death of testatrix—Tenant for life and remainderman - - 518
See TENANT FOR LIFE.
—— Renewable Leasehold Conversion Act 187
See RENEWABLE LEASEHOLD CONVERSION ACT.

LEGACY—Charged on real estate—Deficiency of personal estate—Devastavit - 251
See CHARGE ON REAL ESTATE.
—— Charitable - - - - - - 42
See CHARITY.
—— Misdescription of fund - - 80
See MISDESCRIPTION.

LIEN—*Following trust money—Appropriation—Marshalling.*] Money identified as belonging to a customer of the deceased, a stockbroker, was lodged by him to the credit of his current account with his Bank. After his death, which occurred on the day after the lodgment, the Bank transferred the balance due to the deceased on his current account to a loan account, on which he was indebted to the Bank, and sold so much of certain stocks and shares (which they held as security for any balance which might be due to them on the loan account) as were sufficient to pay off the entire amount remaining

LIEN—*continued.*
due to them, and thereupon transferred the remaining securities to the credit of the matter to administer deceased's estate:—*Held*, that the deceased's customer was entitled to follow the money identified as his, and to stand in the place of the Bank, and to have the benefit of their lien on the securities lodged in Court. *In re Reynolds, deceased; M'Mahon* v. *Fetherstonhaugh* [V.-C. 83

LIMITATIONS, STATUTE OF—*Will—Advancement clause.*] A testator bequeathed the residue of his property to trustees, upon trust to sell his interest in the lands of *C.*, and to call in certain sums of money, and to invest in the funds a sum of £1800 for the benefit of his six daughters, and as each of them should marry with consent of the trustees, or require her portion for the purpose of advancing herself in life, then with the like consent to pay such daughter £300. The testator died in 1854; the trustees renounced and disclaimed; and administration with the will annexed was granted to the testator's widow. The plaintiff, one of the daughters, went to Dublin about 1860, and assisted a friend to carry on the business of a milliner. In 1875 the friend, who owned the business, died or retired, and the plaintiff wished to acquire the business, and employed a solicitor, who demanded payment of her share. The share was not paid. In 1885 the plaintiff took a house in Dublin, where she supported herself by setting lodgings, and, in 1891, the house was purchased for her by some friends. She then brought an action to recover her share. *Held* (affirming the decision of the Vice-Chancellor), that the right to receive her share accrued to the plaintiff in 1875, and that her claim was barred by the Statute of Limitations. *Rudd* v. *Rudd* - - APP. 15

LIQUIDATION—Company—Winding up—Bill of sale—Registration - - 368
See BILL OF SALE.

MARRIAGE—Condition in restraint of 130, 142
See CONDITION IN WILL.

MERGER—*Judgment—Mortgage.*] By a mortgage deed the mortgagor covenanted to pay the mortgage debt on a day named, and (by a separate covenant) to pay interest at £60 per cent., so long as any principal money secured by the mortgage should remain unpaid after the day named, on the said principal sum, or on so much as shall, for the time being, remain unpaid. The mortgagee obtained judgment against the mortgagor for the principal and interest then due:—*Held* (affirming the decision of Porter, M.R.), on the authority of *Popple* v. *Sylvester* (22 Ch. D. 98), that the security of the mortgage was not merged in the judgment, but that the mortgagee was entitled to interest at £60 per cent. subsequently to the date of the judgment. *Lowry* v. *Williams* - - APP. 274

MIDDLEMAN — Renewable leasehold — Fee-farm grant - - - - - 187
See RENEWABLE LEASEHOLD CONVERSION ACT.

MISDESCRIPTION — *Will — Demonstrative legacy.*] By her will the deceased testatrix recited that she was absolutely entitled to the sum of "£500 invested in the Australian Bank on deposit receipt, and also to the sum of £200 on deposit receipt in Messrs. *G.'s*, making together the sum of £700," and bequeathed to her son *J.* £300, to her daughter *D.* £200, and to her daughter *E.* £200, portions of said sum of £700. At the time of making her will, and at the time of her death, the testatrix had not any sum on deposit receipt in Messrs. *G.'s*, nor any sum on deposit receipt in the Australian Bank, but there were standing in her name eleven shares in the Union Bank of Australia: —*Held*, that the shares in the Union Bank of Australia passed under the bequest of the sum on deposit receipt in the Australian Bank. *In re Cranfield, deceased; Mosse* v. *Cranfield* V.-C. 80
—— Schedule to bill of sale - - - 368
See BILL OF SALE.

MORTGAGE—Equitable—Conflicting equities
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—— Equitable—Future advances—Notice to lodge deeds - - - - - 201
See NOTICE TO LODGE DEEDS.
—— Judgment registered as—Effect of—Equitable charge on land - - - 468
See JUDGMENT MORTGAGE.
—— Mortgagee's solicitor—Taxation of costs 96
See TAXATION OF COSTS.
—— Subsequent judgment—Merger - 274
See MERGER.

NOTICE TO LODGE DEEDS—*Service of—Bank—Security for future advances—Petition for sale by incumbrancer—Appropriation of payments.*] An owner deposited title-deeds with his bankers, by way of equitable mortgage, to secure past and future advances. A petition for sale having been presented by a subsequent incumbrancer, notice to lodge deeds was served by the petitioner on the Bank:—*Held*, that the petitioner was entitled to priority over any advances made after service of the notice. *In re Keogh's Estate; Leonard, Petitioner* - - - - - MONROE, J., 201

OBJECTION TO TITLE—Conditions—Time— [288, 296
See REGISTRATION OF TITLE. 1.

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—— 1890 (1st March) County Courts, XXXVI. R. 9 - - - - - - 302
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See REJOINDER.
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—— LIV. R. 16 - - - - - - 309
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—— 1891 (21st December) Local Registration of Title Act, R. 20 - - 288, 296
See REGISTRATION OF TITLE. 1.

PARTICULARS—*Sufficiency of — Practice—Adultery—Order in Chambers—Motion to discharge—Appeal—Adjournment into Court—Counsel—Order LIV., Rule* 16.] In his answer to a petition brought by his wife for restitution of conjugal rights the respondent alleged that she had committed adultery. The charges against her, as specified in the respondent's answer, particulars, and affidavit were substantially as follows:—Paragraph 3. The respondent says that the petitioner, on the 4th August, 1890, and frequently in the year 1890, and on the 31st January, 1891, and frequently during the year 1891, and during the year 1892, and in particular on the 21st and 26th November, 1892, and up to June, 1893, visited *C.* at his office (naming it), and on divers of such occasions, which occurred sometimes two or three times a week, including the 4th August, 1890, and 31st January, 1891, committed adultery with him. The respondent is unable to furnish more exact particulars of the dates. Paragraph 4. Between the middle and end of July, 1892, the petitioner, at the *S.* hotel, Dublin, and in July or August (as I believe, on the 22nd July), 1892, at *L.'s* hotel, Cork, committed adultery with *H. S.* Paragraph 5. On the 21st November, 1892, the petitioner, at *L.'s* hotel, Cork, committed adultery with *C.*:—*Held*, that the petitioner was not entitled to require further particulars as regards the charges contained in paragraphs 3, 4, or 5 of the answer. The petitioner issued a summons for further particulars. The application was refused. The petitioner then moved to set aside the order made in Chambers, or, in the alternative, for leave to appeal:—*Held*, that the petitioner, being desirous of appealing against the order made in Chambers, ought to have adopted the course of applying that the case should be adjourned from Chambers into Court, which application would have been granted as a matter of course. *Mahony* v. *Mahony* MAT. 309; APP. 320

PAYMENT OUT OF COURT—Bequest for such charitable purposes as Archbishop shall direct - - - - 42
See CHARITY.

PERMANENCE OF RESIDENCE—Domicil - - - - - - - - 379
See DOMICIL.

PLEADINGS — Special rejoinder — Leave to plead - - - - - - 200
See REJOINDER.

PORTIONS—*Settlement*—"*Payable on marriage, or at such time as settlor should appoint*"—*No appointment*—*Held vested, subject to divesting on death unmarried*—*Misrecital in will not an execution of power.*] *A*, by settlement on the occasion of his second marriage, conveyed lands to trustees, upon trust to raise a sum of £600 for *B*, a daughter of his first marriage, "to be paid and payable to her on her marriage, or to be payable at such other time as he should by deed or will appoint"; and, subject thereto, upon the usual trusts for the wife and children of the second marriage. *A*, by his will, bequeathed all his property to *C*, the surviving child of his second marriage, reciting that he made such disposition considering that *B* had been sufficiently provided for by his marriage settlement, under which she would be entitled to receive the sum of £600 after his death. *B* survived the testator, and was unmarried:—*Held*, upon the construction of the settlement, that *B*. was entitled to a vested interest in the sum of £600, liable to be divested in the event of her dying without having been married, and that the incorrect recital in the will was not an exercise of the power of appointment. *Haverty* v. *Curtis* - - - - - - - M. R. 23

—— Postponement of jointure to mortgage of portion—Priority how far affected 87
See JOINTURE.

—— Power to charge—Tenant for life of undivided moiety - - - - - 214
See POWER. 2.

POWER—*Limited*—*Alleged execution of power by will prior in date to settlement creating power*—*Wills Act*, 7 *Wm.* 4 *and* 1 *Vict. c.* 26, *ss.* 24, 27.] The 27th section of the Wills Act (7 Wm. 4 & 1 Vict. c. 26) refers exclusively to general powers of appointment, and does not apply to limited or special powers. Property comprised in a limited or special power of appointment exercised by will is not within the 24th section of the Wills Act, as being real or personal estate comprised in the will. *Dictum* of Stirling, J., in *Re Wells; Hardisty* v. *Wells* (42 Ch. Div. 646) approved of. *Stillman* v. *Weedon* (16 Sim. 26) considered. *Doyle* v. *Coyle* [M. R. 205

2 —— *To charge portions*—*Younger children*—*Power to charge*—"*Tenant for life of lands*"—*Tenant for life of undivided moiety*—*Exercise of power*—*Selection*—*Exclusive appointment*—37 & 38 *Vict. c.* 37.] By his will, executed in 1869, a testator devised his real and freehold estate to *M.* and *B.* (two married female relatives) in such terms as to constitute each of them tenant for life of an undivided moiety of the estate, with remainder, as to the share of each, to her first or other son in tail male, and in default of such issue of either, then to the survivor, with remainder to her first or other son in tail male. Then, "as to the entirety of said real and freehold estate on failure of all the limitations hereinbefore expressed," the testator gave and devised his said real and freehold estate to *H.* for her life, and after her death to her son *C.* for life, with remainder to his first or other son in tail male. In default of such issue there followed similar limitations in succession, as regards the whole real and freehold estate in favour of the other sons of *H.* living at testator's death for life, with remainders to their respective first or other sons in tail male. There were similar remainders in favour of the sons of *X.* for life and their respective sons in tail male. On the failure of the issue of such persons the testator provided that the estate should go back to the female line, with limitations in tail to the daughters of *M.* and *B.*, with cross-remainders; and then there were remainders in the daughters of *H.* and the daughters of *X.* There was an ultimate remainder in fee to the testator's own right heirs. Testator devised his lands and tenements held for terms of years to trustees, to pay rents, &c., and subject thereto upon trust to permit the same to be enjoyed as nearly as the difference of tenure and the rules of law would allow, according to the limitations and provisions declared of his real and freehold lands. The testator provided that every tenant for life in possession should have the power of charging £300 as a jointure for his wife. The will then provided as follows:—"I also empower every tenant for life of my lands and tenements, whether freehold or chattel, when in possession under the foregoing limitations, by deed or will, to charge same with any sum or sums of money not exceeding in the whole by any one tenant for life the sum of £5000, for the portion or portions of his younger child or children, and payable at such time or times as he or she shall appoint, and to create terms of years for securing same, with interest, &c., from the day of the decease of such tenant for life." Testator then empowered "every such tenant for life when in possession" to demise by lease all or any part of his real, freehold, and leasehold estates, for certain terms of years specified in the will. There was a "name and arms" clause contained in the will. As to his residuary estate, after payment of legacies, the testator directed his trustees to invest the same, pursuant to provisions for investment contained in the will, and then to hold the same in trust for the same purposes and uses, and as far as the rules applicable to personal property would allow, for the same persons, and

POWER—*continued.*
according to the same limitations, as were provided concerning his real and freehold estate. The testator died in 1875, at which time *B.* was a widow, with two daughters only. By deed, dated the 27th September, 1875, she charged her moiety of the "lands, tenements, hereditaments, and chattels," bequeathed to her for life by the testator, with the sum of £5000, for the portions of her two children and the survivor of them, to be paid to them or her after her own decease. There was a power of revocation contained in the deed. Subsequently *B.* married *P. W.*, and by deed poll, dated the 17th April, 1877, revoked the previous appointment or charge in favour of the children of her first marriage, and thereby appointed to *E.* (daughter and only child of her second marriage) the sum of £5000, and thereby charged the same on the undivided moiety, of which she was tenant for life, in the houses, lands, and premises (which were then set out, and consisted of freehold estate, or lands, houses, and premises held for terms of years), ". . . together with all other lands, hereditaments, and premises of which the testator was seized, possessed of, or otherwise entitled to, and devised by the said will," with the sum of £5000, to be paid to *E.* after her own (*B.*'s) death. *B.* died in 1883, having survived her second husband. She left no male issue, and *M.* entered into possession as tenant for life of the whole estate. In 1894 *E.*, by her next friend, issued a summons, claiming to be declared entitled to the sum of £5000, as appointee under the deed poll of 1877, and under the will of the testator:—*Held*, 1, that, under the provisions of the will, *B.*, as tenant for life in possession of the moiety of the lands, &c., devised to her by the testator, had power to charge the same with a sum of £5000 in favour of her children. 2. That she had power to appoint, in unequal shares or exclusively in favour of one or more child or children, such sum or sums not to exceed in the whole £5000. 3. That under the deed of 1877 there was a valid appointment of the sum of £5000 in favour of *E.*, and that, under the terms of the deed, one undivided moiety of the lands, hereditaments, and premises of the testator, including the chattels real, and excluding the purely personal estate, were subject to the charge. *Wybrants* v. *Maude* - - - M. R. 214

—— Execution of—Misrecital - - 23
See PORTIONS.

PRACTICE, CHANCERY DIVISION—Administration action—Insolvent estate [512, 530
See HUSBAND AND WIFE. 1, 2.

—— Administration action—Leave to redeem tenancy - - - - - - 185
See ADMINISTRATION ACTION. 2.

PRACTICE, CHANCERY DIVISION—*continued.*

—— Appeal—Minor matter—Appellant in contempt - - - - - - 266
See APPEAL.

—— Land Judge—Declaration of title—Determination of easements—Public right of way
See EASEMENT. [469

—— Land Judge—Money lodged in Court under provisional offer—Solicitor having carriage—Duty as to investment - 259
See SOLICITOR.

—— Land Judge—Notice to lodge deeds—Service of—Subsequent advances - 201
See NOTICE TO LODGE DEEDS.

—— Land Judge—Rental—Error in—Tithe rentcharge—Compensation - - 460
See COMPENSATION.

—— Mode of trial—Action for injunction—Jury
See TRIAL. [504

—— Payment out of Court.
See PAYMENT OUT OF COURT.

—— Pleading—Special rejoinder—Leave to plead
See REJOINDER. [200

—— Receiver—Costs of action in name of owner—Implied indemnity - - - 474
See RECEIVER.

—— Security for costs—Plaintiff out of the jurisdiction—Affidavit - - - 246
See SECURITY FOR COSTS.

—— Specific performance—Payment of purchase money—Order enforcing - - 508
See SPECIFIC PERFORMANCE.

—— Taxation of costs.
See TAXATION OF COSTS.

—— Transfer of action - - - - 504
See TRIAL.

—— Vesting order—Trustees appointed out of Court - - - - - - 172
See TRUSTEE.

PRACTICE, COUNTY COURT—Administration action—Further proceedings in aid of—Carriage of - - - 302
See ADMINISTRATION ACTION. 1.

PRACTICE, PROBATE AND MATRIMONIAL DIVISION—Chambers—Order in—Appeal - - - 309
See PARTICULARS.

—— Costs—Compromise of testamentary suit 103
See COSTS.

—— Particulars—Sufficiency of - 309, 320
See PARTICULARS.

PRINCIPAL AND SURETY—
See SURETY.

PRIORITY—*Conflicting equities—Equitable mortgage—Future advances—Service of conditional order for sale.*] A trust fund was settled upon *S.* for life, remainder to his wife for life, remainder to their

PRIORITY—*continued.*
children. The trustees had power to invest the fund upon leaseholds for an unexpired term of 100 years. *S.* being possessed of a plot of ground, held for 500 years under a lease which contained a covenant to expend £2000 in building on the lands, the trustees applied the trust fund in erecting houses thereon, without obtaining an assignment of the lease or possession of the title-deeds. One of the trustees, on being subsequently advised that a breach of trust had been committed, commenced an action against his co-trustee and *S.*, and obtained a judgment declaring that the trust fund was a lien upon the houses and premises. Prior to this action *S.* had deposited the lease of the premises with a Bank, to secure his then present and future indebtedness. The Court, being of opinion, on the evidence, that the Bank had no notice of the breach of trust, and that the trustees, though guilty of laches, were not parties to the fraudulent conduct of *S.*:—*Held*, that *In re Ffrench's Estate* (21 L. R. Ir. 283) was undistinguishable, and that the Bank, notwithstanding that they had not called for a legal mortgage, were entitled to priority over the claims of *S.'s* wife and children to the extent of advances made to *S.* on foot of the equitable mortgage before service of the conditional order for sale. *In re Sloane's Estate; Carson and Sloane, Petitioners* [Monroe, J., 146

—— Jointure—Postponement to mortgage of one of several portions - - - 87
See Jointure.

—— Mortgagee—Notice to lodge deeds—Subsequent advances - - - 201
See Notice to Lodge Deeds.

RECEIVER—*Insolvent estate—Owner entitled by descent, but having abstained from taking possession—Receiver appointed by incumbrancer—Costs of abortive proceedings against tenants—Implied contract of indemnity.*] An incumbrancer upon an insolvent estate having obtained an order for a receiver, two receivers were successively appointed at his instance, neither of whom succeeded in collecting any rents. About ten years afterwards the Irish Land Commission, who were first incumbrancers, caused a third receiver to be appointed under the order. In the meantime the original owner died, and the estate descended upon his heir-at-law, against whom the proceedings were continued, but who never went into possession or interfered in any way with the estate. The newly-appointed receiver, by leave of the Court, brought an action against a tenant in the name of the present owner. The tenant succeeded on the plea of the Statute of Limitations, and issued execution for his costs against the owner, who was compelled to pay the amount. There being no funds in Court or in the receiver's hands:—*Held*, that the Land Commission

RECEIVER—*continued.*
were bound to indemnify the owner. *In re Slacke's Estate; Slacke, Petitioner* Madden, J., for [Land Judge, 474

RECITAL—Erroneous—Execution of power 23
See Portions.

RECORD OF TITLE—Dealing after 1st January, 1892—Closing record—Duty of vendor - - - - - 288, 296
See Registration of Title. 1.

REDEMPTION—Tenancy under eviction—Administration action—Practice - 185
See Administration Action. 2.

REDEMPTION OF RENT—Fee-farm grant—Fair rent—Tithe rentcharge - 328
See Tithe Rentcharge.

REGISTRATION OF BILL OF SALE—Non-renewal—Limited Company—Liquidation—Winding-up - - - 368
See Bill of Sale.

REGISTRATION OF JUDGMENT—*Judgment not registered within twenty-one days from date of entering—Irish Bankrupt and Insolvent Act*, 1857 (20 & 21 *Vict. c.* 60), *s.* 336—*Debtor's summons—Adjudication.*] A judgment, though not registered within twenty-one days from the date of its recovery, if sufficient in amount and otherwise valid, will support an adjudication in bankruptcy upon a debtor's summons taken out by the judgment creditor. *In re Murphy* - App. 339

REGISTRATION OF TITLE—*Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *s.* 18—*Land recorded under the Record of Title Act (Ireland)*, 1865 (28 & 29 *Vict. c.* 88)—*Dealing after* 1*st January*, 1892—*Rules*, 21*st December*, 1891, *Rule* 20—*Vesting Order—Closing of record—Vendor and purchaser—Duty of vendor—Objection going to root of title—Time condition.*] An order under the Trustee Act, 1850 (13 & 14 Vict. c. 60), appointing new trustees, and vesting lands in them, is a dealing with the land by conveyance, mortgage, or otherwise, within the meaning of Rule 20 (Rules of the 21st December, 1891), under the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66). Where, after the 1st January, 1892, there has been such a dealing with land recorded under the Record of Title Act (Ireland), 1865 (28 & 29 Vict. c. 88), although the record under that Act has not been closed, or a new folio opened under the Local Registration of Title (Ireland) Act, 1891, and the Rules thereunder, the recorded owner is precluded from dealing with the land under the old record, and from recording acts thereunder. Accordingly, where the persons recorded as owners under such a dealing, without having the old record closed or a new folio opened, agreed to sell the land:—*Held*, that they, and not the purchaser, were the proper persons to procure the old record to be closed and a new folio

REGISTRATION OF TITLE—*continued.*
opened; that until this was done they had no title to give; and that an objection on this ground went to the root of the title, and was not too late, though not made within the time stipulated for objections. *In re Carrige and M'Donnell's Contract*
[V.-C. 288; APP. 296

2. —— *Local Registration of Title Act*, 1891 (54 & 55 *Vict. c.* 66)—*Registration of vendor's title—Costs—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *sect.* 82—"*Costs of Conveyance.*"] A Railway Company purchased, under their compulsory powers, part of lands bought by the owner under the Land Purchase Acts, subject to an annuity payable to the Land Commission. The vendor had not registered his title to the lands, pursuant to the Local Registration of Title Act, 1891, and the Company required this to be done, and the title wae registered by the owner accordingly:—*Held*, that the Company was bound to bear the cost of such registration as "costs of conveyance," under sect. 82 of the Lands Clauses Consolidation Act, 1845. *In re Belfast and Northern Counties Railway Co.; Ex parte Gilmore*
[M. R. 297

REJOINDER—*Practice—Leave to plead special rejoinder—Application for — Order XXIII., Rule* 2.] An applicatlon for leave to plead a special rejoinder, under Order XXIII., Rule 2, should be made on notice. *Monck* v. *Smythe* V.-C. 200

RENEWABLE LEASEHOLD CONVERSION ACT—*Lease and sub-lease for lives renewable — No contract by sub-lessor to procure renewals of lease — Rights of sub-lessee*—12 & 13 *Vict. c.* 105, *s.* 14.] Where a lessee for lives renewable for ever makes a sub-lease for lives so renewable, there is, in the absence of a contract to procure renewals, no equity entitling the sub-lessee to compel his lessor to procure renewals for the purpose of feeding the sub-lease. Section 14 of the Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105) is confined to cases where there is a covenant or other binding agreement sufficiently appearing upon the instrument, which creates an obligation upon the middleman to procure renewals. Accordingly, where there was no express contract on the sub-lessor's part to procure renewals of the lease under which he held, nor words from which any such covenant could be implied:—*Held*, that that section did not apply, and that a petition presented by the sub-lessee, who had obtained a fee-farm grant, to compel his lessor to take out a similar grant, should be dismissed. *Renewable Leasehold Conversion Act; Ex parte Quinn* - - - - - - V.-C. 187

RENEWAL OF REGISTRATION—Bill of Sale—Limited Company—Winding-up
See BILL OF SALE. [368

RENTAL—Sale in Court of Land Judges—Tithe rentcharge - - - - - 460
See COMPENSATION.

REPUBLICATION OF WILL BY CODICIL—*Date of — Bringing down the will to the date of the codicil—Contrary intention—Settlement.*] *R. S.*, by will dated the 30th April, 1836, devised all his estates to the use of his daughter *Charlotte S.*, for life, with remainder to her first and every other son in tail male, with remainder to six other persons (brothers and nephews of the testator) as tenants for life, with remainder to their first and other sons in tail male, with remainders over. The testator provided that it should be lawful for his said daughter, or any person who should be by virtue of the said limitations in the actual possession of or entitled to the receipt of the rents of the lands thereby devised, at any time, whether sole or covert, by any deed or instrument in writing to limit or appoint to the use of or in trust for any and every husband or wife whom his said daughter, or such person as aforesaid, should or might thereafter marry, for his or her life, any annual sum or sums of money or yearly rentcharge or rentcharges at the yearly rate of £8 for every £100 by the year of such portion as such husband or wife should pay or settle, not exceeding in the whole the yearly sum of £1000. By a codicil to his will, dated the 18th June, 1855, the said *R. S.* limited an estate in tail female to the daughters of his daughter *Charlotte*, on the condition that if they married, they and their husbands should take the name and arms of *S.* The testator then provided that, his daughter *Charlotte S.* having married *C. W. M.*, he bequeathed to her the whole of his estates and property for life, on condition that all the regulations, stipulations, and reservations in his will should be carried out by her and her husband. The testator added a second codicil dated the 18th April, 1858, which did not alter or revoke any of the provisions already mentioned. In 1848, on the marriage of *Charlotte S.* with *C. W. M.*, by indenture dated the 17th January, 1848, sums of £10,000, secured by mortgage, the fortune of *C. W. M.*, and £10,000 Irish currency, the fortune of *Charlotte S.*, were assigned to trustees upon trust to pay £100 a-year to the wife for pin-money, subject thereto upon trust to pay the income to *C. W. M.* for life; and after his death, in case the wife survived, to pay her £400 a-year for jointure; and after the death of husband and wife in trust for the children as the husband should appoint; and in default of such appointment, as the wife should appoint; and, in default of appointment by either husband or wife, then for the children equally. There were four children issue of the marriage, namely, *Richard Charles*, *Harriette Gertrude*, *Helena*, and *Charlotte*. *R. S.*, the tes-

REPUBLICATION OF WILL BY CODICIL —*continued.*

tator, died in 1858. By indenture, dated the 10th April, 1865, *Charlotte S.*, in pursuance of the power in the will, granted to *C. W. M.* a rentcharge of £800 a-year for his life, to commence from her death, and appointed the lands devised by the will to *W.* as trustee for 200 years to secure the same. After *Richard Charles* came of age the entail was barred, and by deed dated the 12th January, 1881, the estates were resettled, after the death of *Charlotte S.*, to the use of *Richard Charles* for life, with remainder in tail male, with remainder to *Harriette Gertrude* for life, with remainders over. *Richard Charles* died in 1888 leaving an only child, *Claude*, who died an infant. *Charlotte S.* died in 1892, whereupon *Harriette Gertrude* became entitled to the estates, but refused to pay the rentcharge of £800 a-year:—*Held* (affirming the decision of *Porter M. R.*), 1, That although the codicils operated as a republication of the will, and for certain purposes brought down the date of the will to that of the codicils, they did not alter the construction of the will, and therefore the words "hereafter" and "may marry" were to be read as of the date of the will. 2, That the consideration for the raising of the rentcharge of £800 a-year, as prescribed by the will of 1836, was satisfied by the terms of the settlement of 1848 in settling the mortgage for £10,000. *Earl of Mountcashell* v. *Smyth* - - - - - - App. 346

RESIDENCE — Permanence of — Evidence—Domicil - - - - - - 379
See Domicil.

SALE, LAND JUDGE — Notice to lodge deeds — Service of — Further advances by mortgagee - - - - - 201
See Notice to Lodge Deeds.

—— Rental—Error in—Tithe rentcharge—Compensation - - - - - 460
See Compensation.

SALE OF GOODS — Hiring agreement—Construction - - - - - 308
See Hiring Agreement.

SALE OF LAND—
See Vendor and Purchaser.

SCHEDULE — Bill of sale — Description of chattels - - - - - 368
See Bill of Sale.

SECURITY FOR COSTS—*Practice—Plaintiff resident out of the jurisdiction — Satisfactory affidavit—Defence upon the merits—Order XXIX., R. 3.*] By a settlement dated the 30th May, 1863, executed on the marriage of *J. H. W.* and Jane *P.*, the mother of *J. H. W.*, Elizabeth *W.* covenanted with *R. A.* and *J. W.*, the trustees of the settlement, that she would by will give one-third of her real and personal estate to the trustees of the settlement upon trust during the joint lives of *J.*

SECURITY FOR COSTS—*continued.*

H. W. and Jane *P.* to pay the income to Jane *P.* for her separate use, and after the death of either of them upon trust if *J. H. W.* should be the survivor to convey the said share to *J. H. W.* absolutely; but if Jane *P.* should be the survivor to pay the income to her during her widowhood, and on her decease or second marriage upon trust for the children of the marriage in equal shares. By her will, dated the 18th November, 1877, Elizabeth *W.* left all her property to her executors and trustees upon trust to divide the same equally between her three children, of whom *J. H. W.* was one, and in case he predeceased her, his share was to go to his children. She died in 1879, and her will was proved. The plaintiffs were the children of *J. H. W.* and Jane *P.*, both of whom were alive, and all the plaintiffs resided out of the jurisdiction. *J. W.*, one of the trustees, was dead. In an action against *R. A.*, the surviving trustee of the settlement for not having secured for them one-third of the assets left by Elizabeth *W.*, the defendant moved for security for costs, and in his affidavit stated that he had never heard of the death of Elizabeth *W.* until about three years before the action, and no notice of the death had been served upon him or his co-trustee, nor had they been asked to get in the property; that both the parents of the plaintiffs were alive; and the interest of the plaintiffs in any of the property settled was contingent only; and further that the executors of Elizabeth *W.*, in ignorance of the settlement, had paid over one-third of her estate to *J. H. W.*, who afterwards became bankrupt:—*Held* (affirming the decision of Porter, M.R.), that this was not a satisfactory affidavit that the defendant had a defence upon the merits, so as to entitle him to security for costs. *Walker* v. *Atkinson*.
[App. 246

SETTLEMENT — Covenant to settle after acquired property—Chose in action 230
See Covenant to Settle.

—— Issue—Including all descendants - 115
See Issue.

—— Limitation to husband and wife and children of former and intended marriage — Personalty—Joint tenancy - - 7
See Joint Tenants.

—— On testator's daughter — Condition in will [346
See Republication of Will by Codicil.

—— Portions—Vesting - - - 23
See Portions.

SOLICITOR—*Money lodged in Court under provisional offer—Duty as to investment.*] A public department who were anxious to acquire the reversion on a lease which they held, being part of the estate to be sold in this matter, agreed to lodge in Court the sum of £8750 under a written

SOLICITOR—*continued.*
proposal which provided: 1, that the department should continue payment of rent under the lease until a conveyance should be executed by the Court; 2, that the sum to be lodged should be invested in 2¾ per Cents., and the dividends thereon paid to the Secretary of the department to the date of the conveyance; 3, that if good title could not be shown the sum lodged in Court should be repaid to the department. The money was lodged, but neither the solicitor having carriage nor the solicitor for the department took steps to have it invested:—*Held*, that although the solicitor having carriage is responsible, not merely to his own client, but to all persons interested in the property for sale, and to the Court, in seeing that everything in connection with the sale, the fund realised, and its distribution, is properly done, the obligation of causing the fund in the present case to be invested was not, under the special circumstances of the arrangement, so clearly shown to lie on the solicitor having carriage, as to make him personally responsible for the loss occasioned by the non-investment. *In re Harrison's Trustees' Estate* - - - - MONROE, J., 259

—— Costs—Taxation

See TAXATION OF COSTS.

SOLICITORS' REMUNERATION ACT, 1881 - - - - - - 96

See TAXATION OF COSTS.

SPECIAL OCCUPANCY — *Estate* pur autre vie — *Executory agreement — Absence of words of limitation—Devolution of estate*—1 *Vict. c.* 26, *s.* 6.] Fee-simple estates stood limited to *A* (a lunatic so found by inquisition) for life, remainder to *B* for life, remainder to *C* in tail male. For the purpose of purchasing *A*'s life estate *B* and *C* agreed, by instrument in writing, that the net income of the estates should, during the life of *B*, be divided between *B* and *C* equally. *C* having died in the lifetime of *B*, before the agreement was fully carried into effect, leaving *D*, his infant son, who became tenant in tail, it was, by a subsequent instrument in writing, agreed between *B* and *E* (the widow of *C*) that all the rights and interests to which, under the preceding agreement, *C* would have been entitled if he were then living, and the said agreement perfected, should, as between *B* and *D*, pass to *D* absolutely; and by a subsequent deed *B*, in consideration of the agreements, conveyed his life estate to the use of himself and *E*, and their heirs, upon the trusts contained in the agreements, with a declaration of trust by *E* in favour of *D* of all the estates so conveyed to her. *B* and *D* survived *A*. Upon the subsequent death of *D*, *held*, by the Court of Appeal (reversing the decision of the Master of the

SPECIAL OCCUPANCY—*continued.*
Rolls), that *D*'s interest in the moiety of *B*'s life estate passed to *D*'s personal representative, and not to his heir-at-law. *More-Smyth* v. *Mountcashell* [M.R. 44; APP. 63

SPECIFIC PERFORMANCE — *Practice — Defaulting defendant—Conveyance to be executed as an escrow, and to be handed over on payment of purchase-money to plaintiff—Form of order.*] In a vendor's action for specific performance the defendant, not having complied with the decree, was ordered to pay the purchase money into Court within a limited time. The defendant did not comply with this order, and efforts to enforce it by sequestration proved ineffective. An application was then made for an order for payment of the amount to the plaintiff, so that if default was made a writ of *fi. fa.* could issue. The Court made an order for a conveyance to be executed as an escrow, and delivered on payment of the purchase-money and interest, and for payment to the plaintiff by the defendant, at a time and place to be fixed by the judge, after the execution of the conveyance; and by a subsequent order, the conveyance having been executed, the defendant was ordered to pay the purchase-money and interest to the plaintiff within one month from the date of the order. *Jessop* v. *Smyth* - - - - M.R. 508

STATUTES:—

7 Wm. 4 & 1 Vict. c. 26—Wills, s. 6 44, 63
See SPECIAL OCCUPANCY.

—— —— ss. 24, 27 - - - - 205
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8 & 9 Vict. c. 18—Lands Clauses Consolidation, s. 82 - - - - - - 297
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12 & 13 Vict. c. 105—Renewable Leasehold Conversion, s. 14 - - - 187
See RENEWABLE LEASEHOLD CONVERSION ACT.

15 & 16 Vict. c. 31—Industrial and Provident Societies - - - - - 1
See WINDING-UP.

18 & 19 Vict. c. 63—Friendly Societies - 1
See WINDING-UP.

20 & 21 Vict. c. 60—Bankruptcy and Insolvency, s. 336 - - - - - - 339
See REGISTRATION OF JUDGMENT.

21 & 22 Vict. c. 72—Landed Estates Court, ss. 51, 54 - - - - - - 469
See EASEMENT.

23 & 24 Vict. c. 97—Railways, s. 2 - 169
See COMPULSORY PURCHASE.

25 & 26 Vict. c. 89—Companies, s. 199 - 1
See WINDING-UP.

STATUTES—*continued.*
28 & 29 Vict. c. 88—Record of Title 288, 296
See REGISTRATION OF TITLE. 1.
37 & 38 Vict. c. 37—Appointment - - 214
See POWER. 2.
38 & 39 Vict. c. 60—Friendly Societies - 1
See WINDING-UP.
40 & 41 Vict. c. 57—Judicature, sect. 28, sub-s. 1 [512, 530
See HUSBAND AND WIFE. 1, 2.
42 & 43 Vict. c. 50—Bills of Sale, ss. 8, 11 368
See BILL OF SALE.
44 & 45 Vict. c. 44—Solicitors' Remuneration 96
See TAXATION OF COSTS.
45 & 46 Vict. c. 57—Married Women's Property, s. 3 - - - - 512, 530
See HUSBAND AND WIFE. 1, 2.
46 Vict. c. 7—Bills of Sale, s. 17 - - 368
See BILL OF SALE.
54 & 55 Vict. c. 57—Redemption of Rent 328
See TITHE RENTCHARGE.
54 & 55 Vict. c. 66—Local Registration of Title, s. 18 - - - - 288, 296
See REGISTRATION OF TITLE. 1.
—— —— s. 22 - - - - - - 297
See REGISTRATION OF TITLE. 2.
56 & 57 Vict. c. 29—Industrial and Provident Societies. - - - - 1
See WINDING-UP.
56 & 57 Vict. c. 53—Trustees, s. 35 - 172
See TRUSTEE.
57 Vict. c. 10—Trustees, s. 2 - - 172
See TRUSTEE.

STOCK—Vesting order—Trustees appointed out of Court - - - - 172
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SUBLETTING—Renewable leasehold—Fee-farm grant - - - - 187
See RENEWABLE LEASEHOLD CONVERSION ACT.

SUBROGATION—*Company—Implied power of borrowing—Question of borrowing* ultra vires—*Equity of lender to be subrogated to rights of creditors paid out of money borrowed—Interest on loan.*] A Company formed to purchase and work the ship "Lough Neagh," when the ship was ready for delivery, requested *J. W.* (who was one of the directors of the Company), to advance to them the sum of £7500, which was owing to the builders in respect of the price of the ship in order to have it released and to obtain possession of the same. *J. W.* agreed to lend the money, to be repaid with interest at 7 per cent. The money was *bona fide* advanced by the firm of *J. & R. W.*, merchants (of which firm *J. W.* was a member), and was paid to the shipbuilders by the Company. The ship was in consequence released and became the property of the Company. Company had not at the time any means (without borrowing) available and sufficient for the payment to the shipbuilders, and but for the loan the Company would not have obtained delivery of the vessel. There was no express power authorizing the borrowing of money for the purpose of paying for the ship itself, or of providing capital for the undertaking, contained in the memorandum of association of the Company. The Company was being wound up under an order of the Court, and *J. & R. W.* claimed the amount of their loan and interest at 7 per cent. per annum:—*Held*, that *J. & R. W.* were entitled to be subrogated into the position of creditors of the Company in respect of the loan of £7500:—*Held* also, that as there was nothing before the Court to show that the shipbuilders were specifically entitled to interest in reapect of the debt due to them, and as the claimants were simply placed in their position as regards the £7500, they were not entitled to interest on the loan at 7 per cent. or any other agreed rate, but that they should be allowed interest on the loan at the Court rate of 4 per cent. *In re Lough Neagh Ship Co.; Ex parte Workman* [M. R. 533

SUBSTITUTED GIFT—Children—Absolute interest of parent—Will—Construction
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SURETY—*Counter security given by principal to surety—Insolvency of surety—Dividend on debts—Rights as to counter-security.*] *R.* gave a bond to *M.* to secure the performance of certain duties by *F.* *F.* assigned to *R.* certain policies of assurance of less value than the amount of the bond, by way of counter-security to *R.* *F.* failed to perform his duties, and the entire amount of the bond became payable. *R.* died, and his estate was insolvent. *F.* was ready to assign the equity of redemption in the policies to *M.*, and *M.* was ready to release *R.'s* estate on obtaining an assignment of the policies from *F.* and *R.'s* personal representative:—*Held*, that *M.* was entitled to the assignment from *R.'s* personal representative on *R.'s* estate being released, and that *R.'s* personal representative should join in the assignment. *Reynolds, deceased; M'Mahon* v. *Fetherstonhaugh* - - V.-C. 182

TAXATION OF COSTS—*Mortgagee's solicitor—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order*, 16*th April*, 1884, *Schedule I. Part I.—Scale charge—Investigation of title and searches.*] Work done by solicitors on the occasion of a mortgage, *held*, under the circumstances of the case, not to amount to an investigation of title and searches entitling them to the scale-charge prescribed for a mortgagee's solicitor

TAXATION OF COSTS—*continued.*
by Part I. of Schedule I., to the General Order of the 16th April, 1884, under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44). *Ruttledge* to *Read* - - - - V.-C. 96

TENANT FOR LIFE—*Specific devise of leasehold—Covenant to keep in repair—Breach of covenant by testatrix—Cost of repairs—Tenant for life and remainderman—Trustees of residuary estate.*] As between a tenant for life of a leasehold specifically bequeathed, and the general assets of a testator there is no equity in favour of the latter to throw on the former the obligation of putting the leasehold premises, which were dilapidated at the time of the testator's death, into repair. *Brereton* v. *Day* [M. R. 518

—— Gift to wife to be disposed of as she thinks fit amongst children - - - 334
See TRUST.

TENANT FOR LIFE AND REMAINDERMAN—*Leaseholds—Wasting security—Power of trustees to raise charge by sale, or mortgage, or out of rents and profits—Apportionment of burden of charge between tenant for life and remainderman.*] A testator devised and bequeathed freehold and leasehold property to trustees for a term of 1000 years, upon trust by mortgage, or sale, or by and out of the rents and profits, or by any other reasonable means, to raise a sum of money charged on the lands, and, subject thereto, upon trust for the testator's eldest son for life, with remainder to his first and other sons in tail. The testator died in 1871, and his eldest son entered into receipt of the rents and profits of the property, and paid the interest on the charge. No steps were taken by the trustees to raise the charge until 1894, when an action was brought by them to administer the testator's estate so far as related to the property subject to the trusts of the term. Upon the taking of the accounts in Chambers, the remainderman (the infant son of the tenant for life), contended that the leasehold property should have been sold immediately after the death of the testator, and that the tenant for life should account for the rents and profits received by him since the death. *Held*, that, although the trustees had a discretion as to the mode of raising the charge, the interests of the remainderman—the leasehold being a wasting security—had been prejudiced by the postponement of the raising of the charge, and that the Court had power to adjust the burden of the charge between the parties, according to their interest in the property, and to make the tenant for life contribute to the amount raised. Form of decree. *Marker* v. *Kekewich* (8 Hare, 291) followed; *Blake* v. *O'Reilly* [M. R. 479

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—— "Hereafter may marry"—Will—Republication by codicil—Effect of - - 346
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TITHE RENTCHARGE—*Redemption of Rent Act—Fair rent.*] The liability of a grantee under a fee-farm grant to pay tithe rentcharge is not altered by an order fixing a fair rent under the Redemption of Rent (Ireland) Act, 1891. *In re Ruttledge's Estate* - - MONROE, J., 328
—— Error in rental—Sale, Land Judge—Compensation - - - - - 460
See COMPENSATION.

TRANSFER OF ACTION—Injunction 504
See TRIAL.

TRIAL—*Practice—Jury—Action in Chancery Division for injunction—Order XXXVI., Rule 3—Transfer to Common Law Division.*] An action was brought in the Chancery Division for an injunction to restrain certain nuisances and trespasses to the plaintiff's premises, situate in the City of Dublin, and the obstruction of a way or passage and the access of light and air thereto, and for damages. The defendant applied for an order for a trial with a jury, and that they should visit the premises; or, that the action should be transferred to a Common Law Division:—*Held*, that under Order XXXVI., Rule 3, the Court had a discretion as to ordering a trial with a jury; that the onus lay on the person requiring a jury of establishing the propriety of having a trial by such a tribunal; that under the circumstances the defendant had not discharged that onus, and that a trial with a jury should not be ordered:—*Held* also, that the action should not be transferred to a Common Law Division. Differences between the Irish and English Rules as to right to trial by jury considered. *Walsh* v. *Ryan* - - - - V.-C. 504

TRUST—*Will—Construction—Gift of property to wife, to be disposed of as she thinks fit amongst children—Life estate with trust to dispose amongst children.*] A testator bequeathed to his wife all his interest, right, and title that he was possessed of in certain real and personal property to be disposed of as she thought fit amongst his children during her life or by her will, provided she did not marry: but should she marry, then he ordered that his executors should enter into possession of his property and divide it amongst his children, or dispose of it as they thought proper for their benefit, paying to his wife £20, and she should have no further claim. The widow died without having married again, and without having made any disposition of the property:—*Held*, that the widow had taken an interest for her life in the property, with a trust to dispose of same during her life, or by will, amongst the children; and

TRUST—*continued.*
that, as she had failed to make any such disposition, it was divisible amongst the children in equal shares. *Rorke* v. *Abraham* - - V.-C. 334

—— Following trust money—Lien - 83
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—— For unborn children - - - - 7
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TRUSTEE—*Stock of English Railway—Death of trustees—No personal representative—New trustees appointed under power—Vesting order—Jurisdiction—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 35—*Trustee Act*, 1893, *Amendment Act*, 1894 (57 *Vict. c.* 10), *s.* 2.] Trustees, in whose name a sum of English Railway Stock stood, died, and there was no personal representative of the survivor. New trustees were appointed under a power in the settlement:—*Held*, that in the absence of a personal representative, there was no jurisdiction under the Trustee Act, 1893, to make an order vesting in the trustees so appointed the right to call for a transfer of the stock. *Re Ellis' Settlement* (24 Beav. 426) considered; *In re Cane's Trusts* - M. R. 172

—— Discretion of—Mode of raising charge on leaseholds—Tenant for life and remainderman - - - - - - 479
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—— Execution of power—Prior in date to creation of power—Wills Act, ss. 24, 27 205
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—— Gift to wife to be disposed of as she thinks fit amongst children - - 334
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—— Leasehold — Cost of repairs — Tenant for life - - - - - - 518
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—— Legacy charged on lands if personal estate should prove insufficient—Devastavit 251
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—— Misdescription—Legacy - - 80
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—— Republication by codicil—Effect of on construction of will - - - 346
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WINDING-UP—*Companies Act*, 1862 — *Unregistered Company—Friendly Societies Acts*, 18 & 19 *Vict. c.* 63; 38 & 39 *Vict. c.* 60—*Industrial and Provident Societies Acts*, 15 & 16 *Vict. c.* 31; 56 & 57 *Vict. c.* 39.] The Court has jurisdiction, under section 199 of the Companies Act, 1862, to wind up compulsorily, as an unregistered Company,

WINDING-UP—*continued.*
a Society registered under the Friendly Societies Acts, but not registered under the Companies Act, 1862. Members of a Friendly Society, who have given notice of withdrawal of deposits are not in the same position as outside creditors, and are not entitled *ex debito justitiæ* to obtain an order for winding-up; but where the circumstances, in the opinion of the Court, make it just and equitable so to do, the Court will order such a Society to be wound up. *Independent Protestant Loan Fund Society; Ex parte Morton. Friendly Protestant Partnership Loan Fund Company; Ex parte Hall* [V.-C. 1.

—— Liquidation — Bill of Sale — Registration
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THE END.

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